85-255

NO.

Supreme Court, U.S.
FILED
JUL 18 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

SUNNYSIDE VALLEY IRRIGATION DISTRICT,

Petitioner,

vs.

UNITED STATES OF AMERICA, et al.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PATRICK M. ANDREOTTI of
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163 pp

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QUESTIONS PRESENTED:

1. Was the United States ("U.S.") acting in its capacity as Trustee for the Yakima Indians before and when the 1/31/45 "Judgment" was entered in this case so the Yakima Indians are bound by the terms of the 1945 "Judgment"?

2. Did the District Court with retained jurisdiction to "interpret and administer" the 1/31/45 "Judgment" have jurisdiction in October and November, 1980, to order the release of impounded water from a Yakima Reclamation Project ("Yakima Project") irrigation water storage facility (Cle Elum Reservoir) for fish propogation not authorized in the "Judgment", substantially altering and expanding the water allocation and priority of the U.S. for itself and as Trustee for the Yakima Indians in derogation of the non-Indian irrigators' vested water-property rights

recognized and established by the "Judgment"?

3. Did the District Court's 1/15/79 "Remand Order" in State of Washington, Department of Ecology vs. Acquavella, et al., E.D. Wash. C-77-347, Yakima County Superior Court No. 77-2-01484-5, a Washington State Court general surface water right adjudication (herein "Acquavella"), divest the District Court of jurisdiction in 1980 to adjudicate a major Yakima River Basin Indian treaty water claim then pending in Acquavella and to enter the 10/31/80 and 11/28/80 "Instructions" and "Supplemental Instructions to the Watermaster"?

4. Is the 1/31/45 "Judgment" incorporating the 1914 Congressional Act which, after extensive Congressional hearings and debate, settled all the Yakima Indians' rights in the Yakima River a complete and all inclusive, general

adjudication as between the parties, including the U.S. for itself and as Trustee for the Yakima Indians, of the rights and priorities to use Yakima River Basin surface water which precludes the Yakima Indians and the U.S. as the Yakima's Trustee, from asserting against the other parties in this case a claim for reserved Indian treaty water-fish rights?[1]

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[1]Parties in the U.S. Court of Appeals proceeding are: Petitioner-Sunnyside Valley Irrigation District, Yakima Valley Canal Co., Union Gap Irrigation District, Yakima-Tieton Irrigation District, United States, Roza Irrigation District & Washington State.

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OPINIONS AND ORDERS BELOW:

The 6/14/85 "Amended Opinion" of the United States ("U.S.") Ninth Circuit Court of Appeals sought to be reviewed is reported as a slip opinion and is printed in the Appendix at pages A-1 to A-7. The 9th Circuit's previous 2/06/85 and 9/10/82 Opinions in this case, which were replaced by its 6/14/85 "Amended Opinion", are also

in the Appendix at pages A-8 to A-16 and A-17 to A-26 respectively. The prior, unreported 10/31/80 "Instructions to the Watermaster" and 11/28/80 "Supplemental Instructions to the Watermaster" of the District Court for the Eastern District of Washington are also printed in the Appendix at pages A-27 to A-30 and A-31 to A-34 respectively.

JURISDICTION:

The "Amended Opinion" of the U.S. 9th Circuit Court of Appeals was entered June 14, 1985, and denied timely filed "Petitions for Rehearing" by Petitioner and others. The jurisdiction of the U.S. Supreme Court is invoked pursuant to 28 USC 1254(1).

STATUTES INVOLVED:

1. Act of August 1, 1914 (38 Stat. 582, 604) (herein "1914 Act") reproduced in Appendix at A-35.

2. 43 USC 666(a) (McCarran Amendment):

> "Consent is hereby given to join the United States as a Defendant in any suit (1) for the adjudication of the rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under state law, by purchase, by exchange or otherwise and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the state laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and, (2) shall be subject to the judgments, orders and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances; provided, that no judgment for costs shall be entered against the United States in any such suit."

STATEMENT OF THE CASE:

A. Jurisdiction of the District Court:

This action was commenced in the District Court in 1939 by the U.S. The District Court had jurisdiction pursuant to now codified 28 USC 1345.

B. Factual Background:

In 1902, Congress passed the Reclamation Act (Act of June 17, 1902, 32 Stat. 388, now codified as 43 USC 371, et seq.). The Washington State Legislature in 1904 adopted the Act of March 4, 1905 (now codified as Chap. 90.40 RCW) which permitted the Secretary of the Interior (herein "Secretary") to withdraw from appropriation pursuant to state law "unappropriated" public water to permit the U.S., under the provisions of the Reclamation Act, to determine the feasibility of reclamation projects. In May, 1905, the Secretary filed a "Notice of Withdrawal" consistent with the State Act and began a

feasibility investigation of the proposed Yakima Project.

Before 1905, all the natural flow of the Yakima River had been appropriated to irrigate approximately 14,000 acres of land on the Yakima Indian Reservation and 107,000 acres of off-reservation, non-Indian land. The complete appropriation of the natural flow of the Yakima River resulted in several lawsuits in state court, including litigation to enjoin the appropriation of additional water by the U.S. Indian Service for use on Yakima Indian Reservation land.

On December 5, 1905, the Secretary approved work on the Yakima Project subject to several conditions which included the adjustment of all existing claims of persons and entities actually appropriating water from the Yakima River and its tributaries, the resolution of all suits pending to prevent diversion of water from

the Yakima River and the securing for the Indians on the Yakima Indian Reservation a sufficient supply of water by passage of appropriate Congressional legislation, or otherwise.

The required settlement of existing claims was partially accomplished by the use of "Limiting Agreements" in which diverters voluntarily agreed to limit their claims based on their actual diversion in August, 1905. In addition to the "Limiting Agreements", the Secretary in 1906 limited and settled the entire treaty claim of the Yakima Indian Nation at 147 cfs and the claim for water diverted by the non-Indian Sunnyside Division (of the Yakima Project) canal at 650 cfs which also served land within the boundaries of Petitioner-Sunnyside Valley Irrigation District (herein "SVID"). The "Limiting Agreements" and Secretarial settlement of the Indian and Sunnyside Division claims encompassed

95% of the natural flow of the Yakima River.

The validity of the Secretary's 1906 settlement of the entire Yakima Indian treaty claim was recognized by Congress in the 1914 Act [Indian Appropriation Act of 1914 (38 Stat. 582, 604)].

Congressional passage of the 1914 Act was preceded by extensive investigation and hearings in the Yakima Valley (Washington State) and in Washington, D.C. by a 1913 "Joint Congressional Commission" whose proceedings are documented in the "Report and Recommendations of the Joint Commission on Indian Tuberculosis Sanitarium and Yakima Indian Reservation Project" [Senate Document No. 337, 63rd Cong., 2d Session (1913)("Commission Report"), Appendix to Petition for Rehearing and Suggestion for Rehearing en banc of Sunnyside Valley Irrigation District ("Rehearing Appendix" pp. 1-375)].

The entire focus and purpose of the 1913 Commission hearings and the 1914 Act were to finally determine and settle the amount of water from the Yakima River to which the Yakima Indians were entitled pursuant to their 1855 treaty. (Commission Report, Rehearing Appendix pp. 45-46, 57, 71, 72, 84, 114.)

Witnesses testifying before the Commission and the Commission members themselves recognized the U.S. had "taken" or abrogated Yakima Indian treaty water rights by opening non-Indian land outside the Yakima Reservation for settlement and requiring non-Indian settlers to improve and cultivate their land, which could only be accomplished by appropriation and irrigation from the Yakima River. (Commission Report, Rehearing Appendix, pp. 35, 189.)

In 1891, the U.S. Indian Service Commissioner advised the Interior Secretary construction of the Sunnyside Dam would

have an adverse effect on Indian fishing rights and recommended the U.S. Attorney General start litigation to protect Indian fishing rights as well as Indian rights to water of both the Yakima River and Ahtanum Creek. (Commission Report, Rehearing Appendix, p. 142.)

The U.S. did not enjoin construction of Sunnyside Dam but instead acquired and improved the Sunnyside Dam to serve the 103,000 acre off-reservation Sunnyside Division as part of the Yakima Project.

The Commission also recognized, although the U.S. had not in 1906 allocated sufficient water to the Yakima Indians, the off-reservation white settlers in the Yakima Valley had acquired, appurtenant to their off-reservation land, vested water rights in the natural flow of the Yakima River which could not be taken by the U.S.

In the Commission's "Report", a Commission member-Congressman Burke- stated:

> "Undoubtedly, the government was derelict in not protecting the rights of these Indians to waters in this stream. The fact that they did not do it cannot be remedied now; what I mean is you can't turn back the clock." (Commission Report, Rehearing Appendix p. 38.)

The Commission further stated in its "Report":

> "From a consideration of the whole subject, we believe that vested rights have accrued to water users other than those on the reservation and that the low-water flow of the Yakima River is insufficient to supply their needs and the requirements of said reservation." (Emphasis Added) (Commission Report, Rehearing Appendix, p. 25.)

The Commission recognized the primary purpose of the 1855 U.S.-Yakima Indian Treaty was transforming the Yakima Indians into an agrarian, not a fishing, society, stating:

* * *

> "The controlling purpose of the treaty, however, was to make possible

> the permanent settlement of the Yakima Indians and their transformation into an agricultural people." (Commission Report, Rehearing Appendix, p. 23.)

After extensive testimony about: (1) the Yakima Indian treaty rights as defined by Winters vs. U.S., 207 U.S. 564 (1908), (Commission Report, Rehearing Appendix pp. 23, 35-36, 38, 41, 42, 46, 57-58, 69-72, 77, 78-83, 85-86, 93, 114-117, 136-137, 140-143, 147-150, 183, 336, 356, 362), (2) the amount of irrigable land on the reservation, and (3) the conflicting, vested appurtenant water rights of off-reservation white settlers (Commission Report, Rehearing Appendix pp. 24-25), the Commission determined and recommended the Interior Secretary's 1906 limitation of the Yakima's treaty reserved water right be remedied, not by attempting to take the vested water rights of non-Indian, off-reservation white settlers, but by appropriating sufficient money so the U.S.

could purchase 573 cfs of proratable water to be supplied from Yakima Project irrigation storage, which together with the 147 cfs allocated in 1906 by the Secretary, totalled the 720 cfs the Commission determined the Yakima Indians were entitled by their 1855 treaty and which was sufficient to fulfill all the Yakima treaty purposes.

Indian treaty rights in general, and final settlement of all the Yakima Indians' treaty water rights, were also extensively discussed in the Senate and House debates of the 1914 Act. (Commission Report, Rehearing Appendix, pp. 377-78, 381, 384, 397-398, 400-416, 426-433, 447-449, 451, 457, 460, 461-468.)

Congress's 1914 Act confirmed and added to the Secretary's 1906 limitation of 147 cfs, a proratable 573 cfs of water to be provided from Yakima Project storage for a total Indian diversion of 720 cfs and finally settled the Yakima Indians' entire

treaty irrigation and fish water rights without diminishing the existing, vested, appurtenant irrigation water rights of Petitioner-SVID and other non-reservation irrigation water users.

The 1914 Act in pertinent part specifically states:

> " . . . , the Secretary of the Interior is hereby authorized and directed to furnish at the northern boundary of said Yakima Indian Reservation, in perpetuity, enough water in addition to the 147 cubic feet per second heretofore allotted to said Indians, so that there shall be, during the low water irrigation season, at least 720 cubic feet per second of water available when needed for irrigation, this quantity being considered as the equivalent to and in satisfaction of the rights of the Indians in the low water flow of the Yakima River. . . . " (Emphasis Added)

The U.S. in compliance with the 1914 Act and the 1945 "Judgment" is providing the Yakima Indians with 720 cfs plus 350,000-acre feet of proratable Yakima Project storage accumulated water (Warren

Act) by agreements dated 3/09/21 and 9/03/36.

Between 1905 and 1933, the U.S. Bureau of Reclamation (herein "Bureau") constructed six (6) reservoirs in the Yakima River Basin having an active storage capacity of 1,020,700 acre feet.

Irrigation water contracts executed by the U.S. between 1906 and 1939, including the additional 350,000 acre feet of pro-ratable storage water for the Yakima Indian Reservation, however, requires the U.S. to annually deliver, for irrigation only, in excess of 1,700,000 acre feet of water.

In 1939, the U.S. filed this action (Civil 21) for judicial determination of the U.S. obligation to deliver water to land within Petitioner-SVID's boundaries without the payment of additional construction charges. The U.S. further requested the District Court determine if the U.S. was obligated to deliver to SVID's

water users only a pro-rata share of the water supply available from the Yakima Project in a water-short year [Complaint and Petition for Declaratory Judgment, Excerpt of Clerk's Record ("ECR") p. E-28, paragraph (b)].

The U.S. also requested, in the alternative, if SVID was entitled to delivery of more water than specified in its contracts, or more than a pro-rata share of water available, the Court determine which of the plaintiff-irrigation districts and other defendants should have their contract rights reduced to provide SVID and other water users who had prior vested, natural flow rights with the amount of water they claimed. [Complaint and Petition for Declaratory Judgment, ECR p. E-29, paragraph (d)].

In addition, the U.S. asked the Court to enter a declaratory judgment determining the water rights of plaintiffs including

the U.S. as against the defendants including SVID and the water rights of the defendants against each other. [Complaint and Petition for Declaratory Judgment, ECR p. E-29, paragraph (e)].

SVID and other defendants appeared, answered the U.S. "Complaint", and cross-claimed for a general adjudication and joinder of all additional parties necessary for a general adjudication of all Yakima River Basin surface water rights.

In 1942, proceedings in this case (Civil 21) were stayed pending a final determination in the consolidated cases of Etter vs. Ickes, Parks vs. Ickes, and Fox vs. Ickes, then before the District of Columbia Court of Appeals to determine the U.S.' obligation to deliver water to individual SVID water users without payment of additional construction charges.

The 1943 D.C. Court of Appeals "Decision" of the above three (3) consoli-

dated cases [Fox vs. Ickes, 137 F.2d 30, (D.C. Cir. 1943), Cert. denied 320 U.S. 792], rendered moot in this case the issue of the U.S.' obligation to deliver water to SVID water users without additional charges.

There remained before the District Court in this case only the issue of the Yakima River Basin water users' respective rights and priorities, including the U.S. as Trustee for the Yakima Indians and for itself raised by the U.S. "Complaint" as well as by SVID's and other Defendants' "Cross-Complaints" for a general adjudication.

In January, 1945, all parties including the U.S. for itself and as Trustee for the Yakima Indians negotiated and settled between themselves all their water right claims in Yakima River Basin surface water, to avoid costly, protracted litigation which would have been required

in the pending "general" water rights adjudication.

The parties' settlement was described in and confirmed by the District Court's 1/31/45 "Judgment" which is included in the Appendix at pages A-67 to A-96.

"Judgment" paragraph 4 (Appendix A-79-80) confirms the right of the Yakima Indians to receive 720 cfs pursuant to the 1914 Act and 350,000-acre feet pursuant to the 1921 and 1936 contracts. Before 1945, the 573 cfs from storage had been proratable with other Project storage in a short water year. "Judgment", paragraph 19(1) (Appendix A-93) grants the 573 cfs priority over other storage water rights by making it non-proratable for the first time in 1945.

The "Judgment" was intended to be a final determination, as between the parties, including the U.S. for itself and as trustee for the Yakima Indians, of their

total right and claim to the delivery and use of surface water within the Yakima River Basin and the parties including the U.S., were permanently enjoined from asserting claims against each other contesting the water rights described by the "Judgment".

The Yakima Project was operated consistent with the terms of the 1945 "Judgment" without challenge for 32 years. During the 32 years, landowners in all divisions of the Yakima Project including the Sunnyside Division substantially developed their property, incurred enormous financial obligations and conveyed interests in real and personal property within the Yakima Project in reliance on their appurtenant, vested, natural flow and non-proratable water rights established and described in the 1945 "Judgment".

In 1977, Roza Irrigation District ("Roza") and Kittitas Reclamation District

("KRD") sought to reopen the 1945 "Judgment" and have its provisions modified to prohibit Bureau delivery of "storage" water to satisfy non-proratable or natural flow rights.

The District Court on 4/22/77 held it did not have jurisdiction or authority to re-open the "Judgment" and take away vested property rights in existence for more than thirty (30) years.

After the Roza and KRD Petitions were filed in 1977, the Yakima Indians "Motion to Intervene" in this case was denied. The Indians' "Motion" for intervention asserted a treaty fish water claim for a minimum instream water flow of 500 cfs. at all times in all parts of the Yakima River.

The Yakima Indians did not appeal the District Court's "Order" denying its intervention in this case.

In the fall of 1980, approximately 60 salmon redds (nests of salmon eggs) were

discovered in a stretch of the Yakima River between the confluence of the Cle Elum and Teanaway Rivers. Yakima Indian, Washington State and federal fish biologists asserted a portion of the redds in the river would be destroyed if the Bureau followed its usual practice of water storage and completely closed the gates of the Cle Elum Reservoir at the end of the 1980 irrigation season to begin storing water for the 1981 irrigation year.

Closing of the Cle Elum Reservoir gates would limit the Yakima River to its unregulated natural flow and would, the biologists claimed, not be sufficient to provide water to sustain some of the salmon redds during their incubation.

Shortly before the scheduled 10/20/80 closure of the Cle Elum Reservoir gates, representatives of the Yakima Indians requested Yakima Project superintendent, Bill Gray, continue and even increase the

amount of water released from Cle Elum Reservoir to maintain an instream flow of 650 cfs. in the Yakima River between the Cle Elum and Teanaway River confluences.

Mr. Gray, who in 1977 had been appointed "watermaster" by the District Court (Judge Neill) to administer the 1945 "Judgment", requested instructions from the District Court (Judge Quackenbush), to clarify the watermaster's authority and responsibility consistent with the 1945 "Judgment" to provide irrigation storage water for fish, and maintain the flow of water requested by federal, state and Indian fish biologists pending a hearing on his "Request" for instructions.

An "emergency" hearing on Gray's "Request" after only two (2) days' prior telephone notice to SVID and other non-U.S. parties in this case was held in Spokane, Washington, on 10/29/80.

At the 10/29/80 hearing, District Judge Quackenbush found and concluded:

1. When the 1945 "Judgment" was entered, the U.S. acting as Trustee for the Yakima Indian Nation had not asserted a treaty fish claim, but only a treaty irrigation water claim, and,

2. The treaty fish issue, raised by the Yakima Indian Nation and the U.S. in behalf of the Yakima Indians on 10/29/80, was not raised before entry of, limited or settled by the 1/31/45 "Judgment"or the 1914 Act, is the same treaty right established by U.S. vs. Washington, 506 F.2d 187 [W.D. Wash. 1980 (Vacated 759 F.2d 1353 (9th Cir. 1985)] ("Boldt II") and would be protected by the Court consistent with Boldt II.

The Court further held it had continuing jurisdiction pursuant to paragraph 20 of the 1945 "Judgment" to order the release of stored water from a Yakima

Project Reservoir intended for irrigation, to preserve the salmon redds.

The Court orally ordered the water-master to maintain a flow in the river (not to exceed 650 cfs) adequate to maintain the salmon redds pending an evidentiary hearing to be held in Spokane on 11/25/80, and, on 10/31/80 entered corresponding written instructions to Watermaster-Gray.

On 11/25-26/80, a second hearing was held in Spokane. At the beginning of the hearing, Judge Quackenbush indicated he was willing to consider arguments, receive briefs, and take testimony about the amount of water needed to preserve the salmon redds and suggested methods to minimize irrigation water releases from Cle Elum Reservoir, but not about the validity or legal obligation of the Court based on Boldt II, supra to protect the Yakima Indian Treaty fish claim.

Following the hearing, the Court on 11/28/80 issued "Supplemental Instructions to the Watermaster" which directed Mr. Gray to: (1) maintain a flow of water approximating 650 cfs in the Yakima River where the salmon redds were located, provided the flow could be regulated below 650 cfs so long as the salmon redds were not endangered and after consulting with named fish biologists, (2) implement protective measures found to be appropriate after consultation with the same fish biologists, (3) continue to consult with the fish biologists to provide continuous monitoring of the salmon redds' condition and flow of the river to permit the watermaster to, in the exercise of informed discretion, provide for a reduction of flow consistent with protection of the spawning redds, and, (4) report to the Court before start of the 1981 irrigation season operating methods to satisfy the needs of the Yakima Project

farmers through more efficient or more intensive use of Project water or by modification of Project operation or facilities to minimize adverse impact on the fish.

The District Court in 1980 recognized its "Findings and Conclusions" were based on very short notice of the emergency hearings to Appellants (2 days prior to the 10/30/80 hearing; 25 days' prior notice of the 11/25/80 hearing) and an incomplete record which the parties would have an opportunity to supplement. (11/25-26/80 Transcript)

Since 11/80, substantial documentation of the 1914 Act's legislative history and of the 1945 "Judgment" in this case has been discovered and admitted as evidence in Acquavella, supra, and is included in the 9th Circuit record of this case. (See, Rehearing Appendix)

Timely appeals from Judge Quackenbush's 10/30/80 and 11/28/80 "Instructions" and "Supplemental Instructions to the Watermaster" were filed by SVID and other parties. The U.S. 9th Circuit Court of Appeals on 6/14/85 in an "Amended Opinion" affirmed the District Court's "Orders and Instructions".

The 9th Circuit held the jurisdiction retained by the District Court to administer and interpret the 1945 "Judgment" authorized the District Court to enter the appealed "Orders and Instructions" because the "Judgment" specifically stated it did not adjudicate the rights of non-parties and the Yakima Nation was not a party.

In addition, the 9th Circuit held the District Court was <u>not</u> required to dismiss the proceeding in favor of the pending Washington State Superior Court general adjudication of all Yakima River Basin

surface water because the "Akin factors" [Colorado River Water Conservation District vs. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)] were not present.

The 9th Circuit also held the Yakima Indian Nation and the U.S. as Trustee for the Yakima Indians were not precluded from asserting a treaty fish water claim because the 1945 "Judgment" was not a "general adjudication" of all Yakima River Basin surface water rights and did not adjudicate the Yakima Indians' treaty fish rights.

REASONS FOR GRANTING THE WRIT:

1. The 6/14/85 "Amended Opinion" of the 9th Circuit Court of Appeals confirming the District Court's 1980 "Orders and Instructions" fails to follow and is in conflict with numerous decisions of the U.S. Supreme Court and the 9th Circuit which establish the conclusive and

preclusive effect: (a) to be given consent judgments, (b) between the parties, of an adjudication which determines and establishes the parties' water rights as between themselves but does not adjudicate the rights of all users on a stream, (c) of the 1914 Congressional Act and executive action limiting Yakima Indian treaty reserved water rights in the Yakima River Basin, (d) of a Judgment on Indians when they have been represented in litigation by the U.S. as their Trustee, and (e) of state court jurisdiction to resolve all pending water right claims in a single, all-inclusive McCarran Act general adjudication.

2. The 9th Circuit's 6/14/85 "Amended Opinion" which Petitioner seeks to have reviewed will disrupt 80 years of Yakima River Basin reclamation and involves issues of exceptional importance affecting the essential water rights of thousands of

non-Yakima Indian landowners irrigating approximately 335,000 acres of off-reservation land in the Yakima River Basin whose land is valueless without their appurtenant water.

In addition, the 9th Circuit's 6/14/85 "Amended Opinion" confirming the District Court's 1980 "Orders" is an unconstitutional deprivation by the U.S. without compensation for the non-Indian irrigators' appurtenant, vested Yakima River natural flow and storage water rights and creates a new, massive, unquantified "super-priority" Indian claim for Yakima Project natural flow and storage water totally altering and absolutely contrary to Project operation since 1906 which was settled by executive action in 1906, Congressional action in 1914, and the 1945 "Judgment" in this case.

3. The 9th Circuit's 6/14/85 "Amended Opinion" is contrary to Nevada vs.

U.S., ____ U.S. ____, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983) and U.S. vs. Truckee-Carson Irrigation District, 649 F.2d 1286, (9th Cir. 1981), Amended on Rehearing, 866 F.2d 359; U.S. Supreme Court review is necessary to maintain uniformity with Circuit and U.S. Supreme Court decisions.

4. The questions presented for review in this case raise issues of general, national importance which should be resolved by the U.S. Supreme Court because of their impact on the continued orderly development and farming of land in the arid Western U.S. and the Yakima River Basin in Washington State. In addition, final resolution of the questions presented for review in this case is necessary to permit the Yakima County [Washington] Superior Court to proceed with State vs. Acquavella, supra, the Yakima River Basin surface water rights general adjudication started in 1977.

A. U.S. Representation of the Yakima Indians in This Case:

It is undisputed the U.S., as Trustee, may represent Indian interests in litigation and an Indian Tribe so represented is bound by the results. Nevada vs. U.S., supra, at pp. 2924-25, 77 L.Ed.2d 509 (1983); Heckman vs. U.S., 224 U.S. 413 (1912); U.S. vs. California & Oregon Land Co., 192 U.S. 355, 24 S.Ct. 266 (1904); Mars vs. McDougal, 40 F.2d 247 (10th Cir. 1930); Pueblo Picuris of the State of New Mexico vs. Abeyta, 50 F.2d 12 (10th Cir. 1931).

Because the Yakima Indian Nation was not a specifically named party in this case, the 9th Circuit held it was not a party and did not consider whether the U.S., as the Yakima's Trustee, represented Yakima Indian interests in this litigation.

In this case, as in Nevada vs. U.S., supra, the U.S. functioned in a dual capacity: (1) as the operator of the Yakima Project, and (2) as Trustee and advocate of all Yakima Indian water claims.

The U.S. Justice Department in 1944 conceded and concluded the 1945 "Judgment" provided for and contained all the Yakima Indians' treaty water rights. U.S. Justice Department trial attorney, William Veeder, who participated in negotiating, drafting and entry of the 1945 "Judgment" admitted to his Justice Department superior, Norman H. Littell:

* * *

> "The interest of the United States in the project, with the exception of rights claimed by the Indian Service, is very largely that of a carrying and distributing entity . . . with respect to the Indian Service, the judgment as proposed grants to that service what appears to be all the rights to which it is entitled." (Emphasis Added) (Rehearing Appendix p. 481.)

In 1941, while this case was pending in District Court, the U.S. was aware the spring Chinook salmon run netted by the Yakima Indians in the Yakima river would be depleted unless the U.S. operating the Yakima Project ran some flood water over the Sunnyside Dam. (Rehearing, Appendix, pp. 482-85).

The 1945 "Judgment", paragraph 17, provides:

> " . . . Within the meaning of this judgment, flood water is available for such diversions when, as determined by the Yakima Project superintendent, there is flowing over the Sunnyside Dam flood water in excess of the amount he deems necessary for proper river regulation, including in said amount the amount necessary to protect fish lying in the river below said dam. . . . " (Emphasis Added) (Appendix A-91-92)

This provision limiting Petitioner's use of the spring flood water which would otherwise be available to fill or "charge" non-Indian canals and delivery systems was included in the 1/31/45 "Judgment" at the

insistence of the U.S. as trustee for the Yakima Indians. This provision clearly indicates the Indians' interest in fish water was asserted by the U.S., submitted to the Court and finally settled in the 1945 "Judgment".

The record clearly establishes the U.S. was acting as Trustee and advocate for the Yakima Indians in this case.

U.S. Attorney Connelly told the Court in his 1/31/45 "Statement to the Court" (Appendix, A-41) this case involved the right of the Yakima Indian Reservation to a supply of water from the Yakima River.

After Mr. Connelly's "Statement" had been read to the Court, the Court inquired of U.S. counsel about U.S. representation of the Indians and settlement of all Yakima Indian rights and claims by the proposed "Judgment".

In colloquy with the Court before entry of the "Judgment", U.S. Justice Department Trial Attorney Veeder specifically representing the U.S. Justice Dept., U.S. Indian Service and the Yakima Indians, informed the Court all Yakima Indian rights were included in the "Judgment" provisions relating to the Wapato Division of the Yakima Project. The Wapato Division was constructed and is operated by the U.S. to irrigate Indian land on the Yakima Indian Reservation. (A copy of the relevant colloquy is contained in Appendix A-51.)

The 1945 "Judgment" water rights established for the Yakima Indians were based on the 1914 Act which specifically provided 147 cfs plus an additional 573 cfs of proratable storage water totalling 720 cfs in satisfaction of the Indians' rights in the low water flow of the Yakima River and the 1921 and 1936 Bureau-Indian Service

agreements to provide the Indians with 350,000 acre feet of additional proratable storage water.

The failure of the 9th Circuit to recognize the privity between the U.S. and the Yakima Indians in this case is clearly contrary to the cases above cited, especially Nevada vs. U.S., supra.

The 9th Circuit's 6/14/85 "Amended Opinion" completely destroys finality of the 1945 "Judgment".

If the "Amended Opinion" is applied to hundreds of other cases in which the U.S., as Trustee, has in the past century represented Indian treaty rights and interests without the Indians being joined as named parties, it would result in the reopening of long-settled claims and the judicial destruction of Judgment established vested property rights which are the foundation of irrigation and development in the arid Western U.S.

B. The District Court's 10/31/80 and 11/28/80 "Orders and Instructions" Exceeded Its Retained Jurisdiction in this Case:

Pursuant to 1945 "Judgment", paragraph 20, the District Court retained jurisdiction "over matters of interpretation of this Judgment and matters relating to the administration thereof" and to appoint a watermaster to administer the water rights described by the "Judgment". (Appendix A-95)

Paragraph 20 also provides the "Judgment" does not affect the rights of any claimants of water in the Yakima River Basin not parties in this case.

Based on its erroneous determination that the Yakima Indian Nation was not a party in this case, the 9th Circuit held the District Court properly assumed jurisdiction to interpret the 1945 "Judgment" because of the "non-party" Yakima Indians' claimed treaty rights.

Because the U.S. as Trustee represented the Yakima Indians in this case, the Indians are bound by the terms of the "Judgment". Nevada vs. U.S., supra; Heckman vs. U.S., supra; U.S. vs. California & Oregon Land Co., supra.

The 1945 "Judgment" establishes and declares the obligation of the U.S. to deliver water from the "natural flow" of the Yakima River, its tributaries, from storage in its various reservoirs and other sources (cumulatively described in the "Judgment" as the "total water supply available") to the Plaintiffs, to Defendants and to land within the Yakima Indian Reservation.

U.S. irrigation water delivery in the Yakima Project for each of the parties, including Yakima Indian land within the Wapato Division, is specifically allocated in the "Judgment" for each month of the irrigation season from April through

October. The only "Judgment" authorization for Yakima Basin surface water use in addition to the specific monthly allocations is the diversion of "flood water" as defined in "Judgment" paragraph 17 and diversion in October of Yakima River "natural flow", if available, to some irrigation districts which have no October water right.

The District Court's retained jurisdiction is very limited and does not include authority: (a) to modify or limit the vested water rights recognized and established by the "Judgment", or (b) to allocate any portion of annual "total water supply available" provided by the "Judgment" for fish propogation or other use not recognized or established by the "Judgment".

The District Court's 1980 "Orders" of water releases from a Yakima Project irri-

gation water storage facility for salmon redds, was not "interpreting" or "administering" the "Judgment", but was a modification of the "Judgment" which unconstitutionally eliminated and destroyed without compensation vested irrigation water-property rights of parties in this case, including landowners of Petitioner-SVID.

The District Court's 1980 modification of rights established by the "Judgment" is clearly contrary to U.S. vs. Swift, 286 U.S. 105, 76 L.Ed. 999 (1931) and U.S. vs. Armour & Co., 402 U.S. 673, 91 S.Ct. 1752 (1971).

Consent judgments, including the 1945 "Judgment", based on facts not subject to change, must be construed as written and not as the "Judgment" might have been written had one of the parties established particular factual claims and legal theories in litigation.

C. Previous District Court Remand of General Adjudication to Washington State Court Divested District Court of Jurisdiction to Issue 1980 "Orders and Instructions" Adjudicating a Major Yakima River Basin Claim:

In 1977, Washington State filed State vs. Acquavella, supra, in Yakima County [Washington] Superior Court for a general adjudication of all surface water rights in the Yakima River Basin. Acquavella was removed by the U.S. to the Federal District Court, Eastern District of Washington, No. C-77-347.

On 1/12/79, District Court Judge Marshall Neill remanded Acquavella back to the Yakima County Superior Court based on the McCarran Amendment (43 USC 666) as interpreted in Colorado River Conservation District vs. U.S., supra, and the District Court's finding Congressional policy favoring state court resolution of water adjudication cases would be defeated if the U.S. were permitted to remove Acquavella to

Federal Court. (Rehearing Appendix pp. 469-470)

The claims in this proceeding by the U.S. and Yakima Indians for the maintenance of Yakima River water to support a treaty fish right was, after Judge Neill's remand, a claim within the jurisdiction of the Yakima County Superior Court in Acquavella.

By entering the 10/31/80 and 11/28/80 "Instructions" and "Supplemental Instructions" to the watermaster, the District Court adjudicated a major claim for Yakima River Basin surface water by determining the Yakima Indians had a valid and unquantified treaty right to fish water which had priority over all Yakima Basin non-Indian irrigation vested water rights.

Although this case is technically separate from Acquavella, the request for relief by the U.S. and Yakima Indians is based on claim issues to be determined in

and a part of the Acquavella general adjudication.

The District Court's 1980 adjudication of Yakima Indian water rights in this case after the District Court's 1979 "remand" and with Acquavella then pending is also directly contrary to Arizona vs. San Carlos Apache Tribe of Arizona, ____ U.S. ____, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983). In San Carlos Apache Tribe, this Court specifically rejected the argument Indian treaty reserved water claims could be determined in a federal forum while the remainder of the claims were determined in a state court general adjudication proceeding stating at 103 S.Ct. 3214:

* * *

> "Moreover, since a judgment by either court would ordinarily be res judicata in the other, the existence of such concurrent proceedings creates the serious potential for spawning an

unseemly and destructive race to see which forum can resolve the same issues first and a race contrary to the entire spirit of the McCarran Amendment and prejudicial, to say the least, to the possibility of reasoned decision making by either forum."

* * *

In this case, the District Court in 1980 at the request of the U.S. and the Yakima Nation on short notice and an inadequate record adjudicated and established an unlimited Indian treaty reserved water right. This adjudication affirmed by the 9th Circuit, is directly in conflict with Colorado River Conservation District vs. U.S., supra, and Arizona vs. San Carlos Apache Tribe, supra.

Jurisdiction to determine the existence and extent of a treaty reserved fish water right was in 1980 vested exclu-

sively in the Yakima County Superior Court by the District Court's 1/12/79 "Order of Remand" of Acquavella.

D. The 1/31/45 "Judgment" Incorporating the 1914 Congressional Act Precludes the Yakima Indians and the U.S., as Trustee for the Indians From Asserting Against Other Parties in This Case a Claim for Reserved Indian Treaty Water-Fish Rights.

The 9th Circuit's holdings in its 9/10/82 and 2/06/85 "Opinions" that the 1/31/45 "Judgment" did not preclude the District Court from granting the relief requested by the U.S. and the Yakima Nation was based on the 9th Circuit's determination the District Court's 1980 action did not involve an implied reserved water right but involved a treaty fishing right subject to the "environmental servitude" established in Boldt II, supra.

On 4/29/85, the 9th Circuit, en banc, vacated that portion of its Boldt II deci-

sion which established the "environmental servitude" to protect Indian treaty fishing rights [U.S. vs. State of Washington, 759 F.2d 1353 (9th Cir. 1985)] and by its 4/29/85 partial vacation of Boldt II, the 9th Circuit wiped out the primary legal authority the District Court relied on for its 1980 "Orders and Instructions" in this case.

The 9th Circuit's 6/14/85 "Amended Opinion" also eliminates the 9th Circuit's previous reliance on Boldt II in its 9/10/82 and 2/06/85 "Opinions" and simply holds res judicata does not apply to preclude Yakima Indian water claims in this proceeding because the 1945 "Judgment" was not a general adjudication and did not adjudicate Yakima Indian treaty rights.

9th Circuit refusal to apply res judicata in this case is clearly erroneous and in conflict with previous decisions of both the U.S. Supreme Court and the 9th Circuit on the preclusive, res judicata

effect to be accorded between the parties of judgments entered in water right cases which are not general water adjudications. See: Montezuma Canal Co. vs. Smithville Canal Co., 218 U.S. 371, 31 S.Ct. 67 (1910); Utah Construction Co. vs. Salmon River Canal Co., 85 F.2d 769 (9th Cir. 1936); U.S. vs. Fallbrook Public Utility District, 345 F.2d 48 (9th Cir. 1965). In each of the above cases, the judgment was given preclusive effect between the parties to it.

Although this case was not a "general adjudication" in which all 1945 diverters from the Yakima River were joined, all parties including the U.S. as Trustee for the Yakima Indians had by 1945 appropriated between 85% and 95% of the total annual Yakima River surface water and intended the 1945 "Judgment" to be a full, complete and general determination, quantification and adjudication as between themselves of all

their Yakima River surface water rights. See, U.S. vs. Fallbrook Public Utility District, supra.

The U.S. alleged in its "Complaint and Petition for Declaratory Judgment" starting this case:

* * *

> " . . . the . . . water rights of said plaintiffs and all of the defendants herein and of all parties having rights to receive water from the Yakima Project are so inter-related and inter-dependent that none of said plaintiffs nor any of the defendants can be permitted to require the delivery to him of more than the specified amount of prorata share thereof . . . without depleting the common source of supply and depriving some other party or parties of part of the water supply to which such other party or parties are entitled . . . " (Emphasis Added) (Complaint, paragraph 18, ECR pp. E14-15.)

* * *

The U.S. prayer for relief in the "Complaint", among other things, requested:

* * *

> "(e) The court enter a declaratory judgment herein declaring and decreeing the rights of plaintiff districts

and of the United States as against the aforesaid defendants and the rights of the several defendants as against each other." (Emphasis Added) (Complaint and Petition for Declaratory Judgment, ECR p. E-29.)

* * *

The U.S. pleadings in this case, like the U.S. pleadings in Nevada vs. U.S., supra, did not specifically allege an Indian treaty fish claim but because they were drafted in broad, comprehensive terms, should, as in Nevada, be held to have placed in issue all the U.S. water right claims including the entire Yakima Indian treaty irrigation and fish water claim.

The Yakima Indians' water rights limited by the Secretary in 1906 and again by Congress in the 1914 Act were in 1945 before the Court and were specifically dealt with in the "Judgment". "Judgment" paragraph 17 specifically provides for the fish in the Yakima River along the eastern boundary of the Yakima Indian Reservation.

The pleadings and 1945 "Judgment" in this case also clearly establish the "cause of action" and claims of the U.S. as Trustee for the Yakima Indians were before the Court in 1945 and included all treaty related water-fish rights.

Pursuant to the general rule that all claims which were, or might have been, raised are precluded, the 1980 claim of the U.S. and Yakima Indians of water rights for fish propogation is barred by res judicata. Nevada vs. U.S., supra, Federated Department Stores, Inc. vs. Moitie, 439 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981); Commissioner vs. Sunnen, 333 U.S. 591, 597, 598 (1948).

9th Circuit refusal to give preclusive effect to the 1945 "Judgment" in this case is an unprecedented departure from accepted principals of res judicata, is unwarranted and merits review by the U.S. Supreme Court.

CONCLUSION

The Yakima Indians were represented in this case by the U.S. as Trustee when this case was started in 1939 and when the 1/31/45 "Judgment" was entered of record. The Yakima Indian Nation is, because of its representation by the U.S., bound by the 1945 "Judgment".

Judicial resolution of all Yakima River Basin surface water right claims including treaty claims by or in behalf of the Yakima Indians was remanded in 1979 by the U.S. District Court for the Eastern District of Washington (Civil No. C-77-347) to the Yakima County [Washington] Superior Court general surface water right adjudication in State of Washington vs. Acquavella, No. 77-2-01484-5.

Although the District Court retained jurisdiction to "interpret and administer" the 1945 "Judgment", the District Court's 10/31/80 and 11/28/80 "Orders and Instruc-

tions" exceeded the Court's retained jurisdiction in this case.

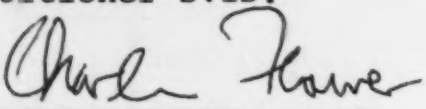
The U.S. and the Yakima Indians are precluded by the 1/31/45 "Judgment" incorporating the 1914 Congressional Act and by res judicata from asserting any reserved Indian treaty water right claims against other parties in this case including Petitioner-SVID.

Petitioner respectfully requests the U.S. Supreme Court grant certiorari in this case to resolve the four (4) "Questions Presented", the inconsistencies of federal law created by the 9th Circuit's 9/10/82, 2/06/85 "Opinions" and 6/14/85 "Amended Opinion" and to preserve the appurtenant, vested water rights of thousands of non-Yakima Indian landowners irrigating approximately 335,000 acres of off-reservation land in the Yakima River Basin and other landowners irrigating thousands of acres in the arid Western U.S.

who are also impacted by Indian treaty water claims and whose land is valueless without appurtenant water rights.

Respectfully submitted,

FLOWER & ANDREOTTI,
Attorneys for
Petitioner-SVID.



CHARLES C. FLOWER

PATRICK ANDREOTTI

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For Publication

FILED

JUN 14 1985

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KITTITAS RECLAMATION DISTRICT,	)	
	)	Nos. 80-3505
Plaintiffs-Appellees,	)	81-3002
	)	81-3068
vs.	)	81-3069
	)	
SUNNYSIDE VALLEY IRRIGATION DISTRICT, et al.,	)	DC# Civil No. 21
	)	
Defendants-Appellants.	)	A M E N D E D
	)	O P I N I O N

Appeal from the United States District Court
for the Eastern District of Washington
District Judge Justin L. Quackenbush, Presiding

[Argued and Submitted July 8, 1982 - Seattle]
Decided February 6, 1985; Amended June 14, 1985

Before: KILKENNY, WRIGHT, and CANBY, Circuit Judges.

WRIGHT, Circuit Judge:

The opinion filed on September 10, 1982, is withdrawn and replaced by this opinion. The 1982 opinion was withheld from publication during our consideration of the petitions for rehearing.

The petitions for rehearing by Sunnyside Valley Irrigation District (Sunnyside), Union Gap Irrigation District (Union Gap), and Yakima Valley Canal Company (Yakima Valley), supported by amicus curiae briefs of the State of Washington, are denied. The petitions for rehearing by Sunnyside, Union Gap,

Yakima Valley, and Yakima-Tieton Irrigation District filed after our February 6, 1985 opinion also are denied.

In the fall of 1980, the district court ordered water released from a Yakima water project reservoir to preserve redds (nests of salmon eggs) threatened by low post-irrigation season water flows. We must decide whether the district court had authority to order the water released.

This appeal involves the collision of two interests: the Yakima Nation's interest in preservation of their fishing rights, and the eastern Washington farmers' interest in preservation of water needed for crops in the dry spring and summer. Irrigation districts in eastern Washington protest the district court's interference with their interests.

The Yakima Nation's interest dates back to its 1855 treaty with the United States. Article III reserved to the Indians "[t]he exclusive right of taking fish in all the streams . . . bordering [the] reservation . . . also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory . . . ." 12 Stat. 951, 953 (1855).

The farmers' interest stems from the irrigation and storage systems constructed by the Reclamation Service in 1909 to 1933, and a 1945 consent decree, which specified the amounts of water to be delivered to the appellant irrigation districts during the irrigation season. The district court retained jurisdiction over the consent decree's interpretation and administration. It entered the orders on appeal under this jurisdiction.

The Chinook salmon normally spawn in the fall when the water in a river is near its lowest levels. This practice ensures that in a natural river system, the spawning site will remain covered with water throughout the year. But artificially high irrigation releases in the early fall of 1980 caused the salmon to misjudge. If officials closed the Cle Elum dam as usual, to begin winter storage, approximately 60 redds would have been exposed and destroyed.

When the Yakima Nation discovered this, it requested the irrigation system's court-appointed watermaster to maintain the water flow. The watermaster, in turn, asked the district court for instructions.

The court held two hearings. At the first, in October 1980, it concluded that the 1945 consent decree did not consider the Yakima Nation's treaty fishing right. Thus, the decree did not limit or preclude measures necessary to preserve that right when operation of the irrigation system threatened to damage the salmon run. Because of the immediacy of the problem, the court ordered release of necessary water until the next hearing, held in November 1980.

After the November hearing, the court issued additional instructions to the watermaster regarding the 1980 to 1981 non-irrigation season. These authorized (1) continued release of water, as necessary, to preserve the redds; (2) use of alternative measures to preserve the redds, such as diversionary berms and transplantation; and (3) monitoring of the redds' condition. The court also ordered a study of methods for subsequent irrigation

seasons (including regulation of reservoir releases during the spawning season) that would accommodate the needs of farmers and, at the same time, preserve the salmon run.

The irrigation districts argue that the court lacked jurisdiction because its order exceeded the scope of authority reserved in the consent decree. Alternatively, they argue that a pending state court adjudication of Yakima basin water rights deprived the court of jurisdiction.

Substantively, the irrigation districts argue that any water right associated with the Indians' fishing right was abrogated by Congress before the consent decree, or in its settlement. They claim also that the decree is res judicata of any water right.

ANALYSIS

The district court did not exceed the scope of its retained jurisdiction under the consent decree.[1/] Paragraph 20 gave the court jurisdiction "over matters of interpretation of this judgment and matters relating to the administration thereof."

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[1] Although neither side argues that mootness or lack of finality bar our jurisdiction, we must examine this issue on our own initiative. Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152, 29 S. Ct. 42, 43, 53 L.Ed. 126 (1908); Willis v. Craig, 555 F.2d 724, 726 (9th Cir. 1977).

We find no lack of finality because we have reviewed similar orders issued by the district court pursuant to its continuing jurisdiction over the consent decree. See Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 626 F.2d 95 (9th Cir. 1980), cert. denied, 449 U.S. 1079, 101 S. Ct. 861, 66 L.Ed.2d 802 (1981). Nor is this case moot because the challenged orders could not be fully litigated prior to the end of their effective period and the situation may arise again. Weinstein v. Bradford, 423 U.S. 147, 149, 96 S. Ct. 347, 348-49, 46 L.Ed.2d 350 (1975) (per curiam).

Appellants argue that this clause limits the court's jurisdiction to disputes between the parties to the decree.

No such limitation appears. The decree specifically stated that it did not adjudicate the rights of persons not made parties, including the Yakima Nation.[2/] The court properly assumed jurisdiction to interpret the decree in light of the Nation's treaty fishing right.

Nor was the district court required to dismiss the proceeding in favor of a state court action generally adjudicating water rights in the Yakima River basin, State of Washington v. Acquavella, No. 77-2-01484-5 (Yakima Co. Super. Ct., filed Oct. 12, 1977). Appellants' reliance on Colorado River Water Conservation District v. United States (Akin), 424 U.S. 800, 96 S. Ct. 1236, 47 L.Ed.2d 483 (1976), is misplaced.

Akin does not hold that a pending state action adjudicating water rights automatically deprives the district court of jurisdiction over issues implicating water. Rather, the Akin Court found only that, based on consideration of several factors,[3/] dismissal of the federal suit in favor of state

---

[2] Paragraph 20 of the consent decree reads in part: "The rights of any claimants to water of the Yakima River or watershed who are not parties to this case shall in no way be prejudiced or affected by this judgment . . . ."

[3] The factors weighing in favor of dismissal in Akin were: (1) that the McCarran Amendment evinced a clear federal policy in favor of general, unified water rights adjudication; (2) that the state had a comprehensive system for adjudicating and managing water rights; (3) that the United States had filed only its complaint in federal court before the defendants moved to dismiss in favor of the state proceeding; (4) that over 1,000 defendants were named, indicating extensive involvement of state water rights; (5) that the federal court was located farther from the area in question; and (6) that in other state water divisions, the

proceedings was justified by wise judicial administration and efficiency.

Those factors are not present here. In Akin, the parties intended both the federal and state court proceedings to be general adjudications of all water rights in the area. The United States had filed only the complaint when the defendants moved to dismiss it in favor of the state proceeding. Here, the district court interpreted a decree entered by it in 1945. The parties intended no general adjudication of water rights and no party moved to dismiss the federal suit.

We do not find that the district court acted inconsistently in denying removal of the Acquavella action based on the Akin factors while retaining jurisdiction here. As noted above, the two actions have little in common.

Because the 1945 consent decree was not a general adjudication of all water rights in the Yakima River Basin and did not adjudicate the treaty rights of the Yakima Nation,[4/] appellants' res judicata argument also fails.

In October 1980, the watermaster and other parties presented the district court with an emergency. The scheduled closing of the dam threatened the redds with destruction.

United States had voluntarily participated in ongoing state water adjudication.

[4] The 1945 decree resulted from a suit filed by the United States in 1939, seeking a declaration of their responsibilities to various contract holders in the Yakima Irrigation System. Neither side joined the additional parties that would have been necessary for a general adjudication, like the one involved in Nevada v. United States, 463 U.S. 110, 103 S. Ct. 2906, 77 L.Ed.2d 509 (1983). The final decree settled only the rights of the irrigation districts made party to the proceeding.

Information on alternative means of preserving the redds was noticeably absent. The court granted the Department of the Interior more time to study the problem and temporarily ordered the water levels maintained in sufficient amount to preserve the redds.

At the second hearing, experts in the field of fish biology testified and suggested actions for preserving the redds other than release of water. One suggested that if 12 of the redds were transplanted, the dam could be closed. The judge ordered these measures taken, including transportation of the endangered redds, construction of berms to divert water into secondary channels, and the opening of some of those channels. Because he was unsure of the effect of these measures, he continued the watermaster's authority to release water as necessary.

We find no abuse of discretion in the court's decision. It was empowered to issue orders directing the allocation of water within the Yakima River system. Its orders authorizing the watermaster to preserve the 1980 redds were reasonable emergency measures.

The order for further study of the problem was reasonable under the circumstances. The study would provide data necessary to insure future disputes could be resolved in the most efficient way.

We affirm the district court's orders.[5/]

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[5] We need not decide the scope of fishing rights reserved to the Yakima Nation under the 1855 treaty.

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PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KITTITAS RECLAMATION DISTRICT, Plaintiffs-Appellees, vs. SUNNYSIDE VALLEY IRRIGATION DISTRICT, et al., Defendants-Appellants.	)	Nos. 80-3505 81-3002 81-3068 81-3069 DC# Civil No. 21 O P I N I O N

Appeal from the United States District Court
for the Eastern District of Washington
District Judge Justin L. Quackenbush, Presiding
Decided February 6, 1985
[Argued and Submitted July 8, 1982]

Before: KILKENNY, WRIGHT, and CANBY, Circuit Judges.

WRIGHT, Circuit Judge:

The opinion filed on September 10, 1982, is withdrawn and replaced by this opinion. The 1982 opinion was withheld from publication during our consideration of the petitions for rehearing.

The petitions for rehearing by Sunnyside Valley Irrigation District, Union Gap Irrigation District, and Yakima Valley Canal Company, supported by amicus curiae briefs of the State of Washington, are denied.

In the fall of 1980, the district court ordered water released from a Yakima water project reservoir to preserve redds (nests of salmon eggs) threatened by low post-irrigation season water flows. We must decide whether the district court had authority to order the water released.

This appeal involves the collision of two interests: the Yakima Nation's interest in preservation of their fishing rights, and the eastern Washington farmers' interest in preservation of water needed for crops in the dry spring and summer. Irrigation districts in eastern Washington protest the district court's interference with their interests.

The Yakima Nation's interest dates back to its 1855 treaty with the United States. Article III reserved to the Indians "[t]he exclusive right of taking fish in all the streams . . . bordering [the] reservation . . . also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory . . . ." 12 Stat. 951, 953 (1855).

The farmers' interest stems from the irrigation and storage systems constructed by the Reclamation Service in 1909 to 1933, and a 1945 consent decree, which specified the amounts of water to be delivered to the appellant irrigation districts during the irrigation season. The district court retained jurisdiction over the consent decree's interpretation and administration. It entered the orders on appeal under this jurisdiction.

The Chinook salmon normally spawn in the fall when the water in a river is near its lowest levels. This practice ensures that in a natural river system, the spawning site will remain covered with water throughout the year. But artificially high irrigation releases in the early fall of 1980 caused the salmon to misjudge. If officials closed the Cle Elum dam as usual, to begin winter storage, approximately 60 redds would have been exposed and destroyed.

When the Yakima Nation discovered this, it requested the irrigation system's court-appointed watermaster to maintain the water flow. The watermaster, in turn, asked the district court for instructions.

The court held two hearings. At the first, in October 1980, it concluded that the 1945 consent decree did not consider the Yakima Nation's treaty fishing right. Thus, the decree did not limit or preclude measures necessary to preserve that right when operation of the irrigation system threatened to damage the salmon run. Because of the immediacy of the problem, the court ordered release of necessary water until the next hearing, held in November 1980.

After the November hearing, the court issued additional instructions to the watermaster regarding the 1980 to 1981 non-irrigation season. These authorized (1) continued release of water, as necessary, to preserve the redds; (2) use of alternative measures to preserve the redds, such as diversionary berms and transplantation; and (3) monitoring of the redds' condition. The court also ordered a study of methods for subsequent irrigation

seasons (including regulation of reservoir releases during the spawning season) that would accommodate the needs of farmers and, at the same time, preserve the salmon run.

The irrigation districts argue that the court lacked jurisdiction because its order exceeded the scope of authority reserved in the consent decree. Alternatively, they argue that a pending state court adjudication of Yakima basin water rights deprived the court of jurisdiction.

Substantively, the irrigation districts argue that any water right associated with the Indians' fishing right was abrogated by Congress before the consent decree, or in its settlement. They claim also that the decree is res judicata of any water right.

JURISDICTION[1]

The district court did not exceed the scope of its retained jurisdiction under the consent decree. Paragraph 20 gave the court jurisdiction "over matters of interpretation of this judgment and matters relating to the administration thereof."

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[1] Although neither side argues that mootness or lack of finality bar our jurisdiction, we must examine this issue on our own initiative. Louisville & Nashville R.R. v. Motley, 211 U.S. 149, 152, 29 S. Ct. 42, 43, 53 L.Ed. 126 (1908); Willis v. Craig, 555 F.2d 724, 726 (9th Cir. 1977).

We find no lack of finality because we have reviewed similar orders issued by the district court pursuant to its continuing jurisdiction over the consent decree. See Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 626 F.2d 95 (9th Cir. 1980), cert. denied, 449 U.S. 1079, 101 S. Ct. 861, 66 L.Ed.2d 802 (1981). Nor is this case moot because the challenged orders could not be fully litigated prior to the end of their effective period and the situation may arise again. Weinstein v. Bradford, 423 U.S. 147, 149, 96 S. Ct. 347, 348-49, 46 L.Ed.2d 350 (1975) (per curiam).

Appellants argue that this clause limits the court's jurisdiction to disputes between the parties to the decree.

No such limitation appears. The decree specifically stated that it did not adjudicate the rights of persons not made parties, including the Yakima Nation.[2] The court properly assumed jurisdiction to interpret the decree in light of the Nation's treaty fishing right.

Nor was the district court required to dismiss the proceeding in favor of a state court action generally adjudicating water rights in the Yakima River basin, State of Washington v. Acquavella, No. 77-2-01484-5 (Yakima Co. Super. Ct., filed Oct. 12, 1977). Appellants' reliance on Colorado River Water Conservation District v. United States (Akin), 424 U.S. 800, 96 S. Ct. 1236, 47 L.Ed.2d 483 (1976), is misplaced.

Akin does not hold that a pending state action adjudicating water rights automatically deprives the district court of jurisdiction over issues implicating water. Rather, the Akin Court found only that, based on consideration of several factors,[3] dismissal of the federal suit in favor of state

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[2] Paragraph 20 of the consent decree reads in part: "The rights of any claimants to water of the Yakima River or watershed who are not parties to this case shall in no way be prejudiced or affected by this judgment . . . ."

[3] The factors weighing in favor of dismissal in Akin were: (1) that the McCarran Amendment evinced a clear federal policy in favor of general, unified water rights adjudication; (2) that the state had a comprehensive system for adjudicating and managing water rights; (3) that the United States had filed only its complaint in federal court before the defendants moved to dismiss in favor of the state proceeding; (4) that over 1,000 defendants were named, indicating extensive involvement of state water rights; (5) that the federal court was located further from the area in question; and (6) that in other state water divisions, the

proceedings was justified by wise judicial administration and efficiency.

Those factors are not present here. In Akin, the parties intended both the federal and state court proceedings to be general adjudications of all water rights in the area. The United States had filed only the complaint when the defendants moved to dismiss it in favor of the state proceeding. Here, the district court interpreted a decree entered by it in 1945. The parties intended no general adjudication of water rights and no party moved to dismiss the federal suit.

We do not find that the district court acted inconsistently in denying removal of the Acquavella action based on the Akin factors while retaining jurisdiction here. As noted above, the two actions have little in common.

SUBSTANTIVE BASIS OF THE ORDERS

The 1855 Treaty reserved to the Yakima Nation extensive fishing rights. See Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 666-667, 99 S. Ct. 3055, 3064-65, 61 L.Ed.2d 823 (1979) (Yakima treaty secured right to fish at numerous accustomed places, both on and off the reservation), United States v. Winans, 198 U.S. 371, 381, 25 S. Ct. 662, 664, 49 L.Ed. 1089 (1905) (Yakima Nation Indians entitled to cross land settled by non-Indians to reach accustomed fishing grounds). The Treaty protects the Nation against restriction of

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United States had voluntarily participated in ongoing state water adjudication.

or interference with their reserved rights. United States v. State of Washington, 506 F. Supp. 187, 203 (W.D. Wash. 1980).

The parties to a treaty bear a duty to refrain from actions interfering with either the Indians' access to fishing grounds or the amount of fish present there. Id. The government constructed the irrigation project subject to that duty. When its operation of the project threatened further to deplete an already low Chinook salmon run, see United States v. Oregon, 657 F.2d 1009 (9th Cir. 1981), it violated its duties under the Treaty.

In the fall of 1980 the regulation of the river water levels interfered with the salmon spawning habits. This violation authorized the district court to correct or offset the damage unless, as appellants argue, the consent decree or prior Congressional action abrogated the Yakima Nation's Treaty fishing right.

Congress may abrogate rights reserved by the Indians, but we do not lightly impute such an intent. Menominee Tribe of Indians v. United States, 391 U.S. 404, 413, 88 S. Ct. 1705, 1711, 20 L.Ed.2d 697 (1968). We find no evidence that Congress abrogated or limited the Treaty fishing right.

Appellants point to 1906 administrative action limiting the Indian Irrigation Project (now the Wapato Irrigation Project) to 147 c.f.s. of water for irrigation purposes, and Congressional action in 1914, which raised this amount to 720 c.f.s.. Indian Appropriation Act of 1914, ch. 222, 38 Stat. 582, 604. Later

contracts between the Bureau of Reclamation and the Project increased the Indians' irrigation water allocation.

The Wapato Irrigation Project was a party to the 1945 consent decree which allocated to the Indians 720 c.f.s. without proration, and the additional contract amounts, subject to proration. The United States was also a party to that decree.

Neither the Wapato Irrigation Project nor the United States represented the Indians for purposes of their fishing water rights. Fishing rights were not a subject of the 1945 dispute. No abrogation or limitation of fishing rights occurred when the irrigation rights were determined.

Because the 1945 consent decree was not a general adjudication of all water rights in the Yakima River Basin,[4] appellants' res judicata argument also fails.

In October 1980, the watermaster and other parties presented the district court with an emergency. The scheduled closing of the dam threatened the redds with destruction. Information on alternative means of preserving the redds was noticeably absent. The court granted the Department of the Interior more time to study the problem and temporarily ordered

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[4] The 1945 decree rsulted from a suit filed by the United States in 1939, seeking a declaration of their responsibilities to various contract holders in the Yakima Irrigation System. Neither side joined the additional parties that would have been necessary for a general adjudication, like the one involved in Nevada v. United States, 103 S. Ct. 2906 (1983). The final decree settled only the rights of the irrigation districts made party to the proceeding.

the water levels maintained in sufficient amount to preserve the redds.

At the second hearing, experts in the field of fish biology testified and suggested actions for preserving the redds other than release of water. One suggested that if 12 of the redds were transplanted, the dam could be closed. The judge ordered these measures taken, including transportation of the endangered redds, construction of berms to divert water into secondary channels, and the opening of some of those channels. Because he was unsure of the effect of these measures, he continued the watermaster's authority to release water as necessary.

We find no abuse of discretion in the court's decision. It had authority to interpret the 1945 consent decree in light of the Treaty fishing right. Its orders authorizing the watermaster to preserve the 1980 redds were reasonable emergency measures taken to protect the Treaty fishing right.

We need not decide the exact scope of the Treaty fishing right. It is enough to note that the Indians' fishing rights are protected and under these circumstances the release of water was justified to avoid damage to the redds.

The order for further study of the problem was a reasonable measure. The study would provide data necessary to insure future disputes could be resolved in the most reasonable and workable way.

We affirm the district court's orders.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 1 1982

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

KITTITAS RECLAMATION DISTRICT, UNITED STATES, et al., Plaintiffs-Appellees, vs. SUNNYSIDE VALLEY IRRIGATION DISTRICT, et al., Defendants-Appellants.	Nos. 80-3505, 81-3002, 81-3068, 81-3069 DC# Civil No. 21 OPINION

Appeal from the United States District Court
for the Eastern District of Washington
District Judge Justin L. Quackenbush, Presiding

[Argued and Submitted July 8, 1982]

Before: WRIGHT, KILKENNY, and CANBY, Circuit Judges.

WRIGHT, Circuit Judge:

In the fall of 1980, the district court ordered water released from a Yakima water project reservoir to preserve redds (nests of salmon eggs) threatened by low post-irrigation season water flows. We must decide whether the district court had authority to order the water released.

This appeal involves the collision of two interests: the Yakima Nations' interest in preservation of their fishing rights, and the eastern Washington farmers' interest in preservation of water needed for crops in the dry spring and summer. Irrigation districts in eastern Washington protest the district court's interference with their interests.

The Yakima Nations' interest dates back to its 1855 treaty with the United States. Article III reserved to the Indians "[t]he exclusive right of taking fish in all the streams . . . bordering the reservation . . . also the right

of taking fish at all usual and accustomed places, in common with citizens of the Territory . . . ." 12 Stat. 25, 27 (1859).

The farmers' interest stems from the irrigation and storage systems constructed by the Reclamation Service in 1909 to 1933, and a 1945 consent decree, which specified the amounts of water to be delivered to the appellant irrigation districts during the irrigation season. The district court retained jurisdiction over the consent decree's interpretation and administration. It entered the orders on appeal under this jurisdiction.

The Chinook salmon normally spawn in the fall when the water in a river is near its lowest levels. This practice ensures that in a natural river system, the spawning site will remain covered with water throughout the year. But artificially high irrigation releases in the early fall of 1980 caused the salmon to misjudge. If officials closed the Cle Elum dam as usual, to begin winter storage, approximately 60 redds would have been exposed and destroyed.

When the Yakima Nation discovered this, it requested the irrigation system's court-appointed watermaster to maintain the water flow. The watermaster, in turn, asked the district court for instructions.

The court held two hearings. At the first, in October 1980, it concluded that the 1945 consent decree did not consider the Yakima Nations' treaty fishing right. Thus, the decree did not limit or preclude measures necessary to preserve that right when operation of the irrigation system threatened to damage the salmon run. Because of the immediacy of the problem, the court ordered release of necessary water until the next hearing, held in November 1980.

After the November hearing, the court issued additional instructions to the watermaster. These authorized (1) continued release of water, as necessary, to preserve the redds; (2) use of alternative measures to preserve the redds, such as diversionary berms and transplantation; (3) monitoring of the redds' condition; and (4) study of methods for subsequent irrigation seasons (including regulation of reservoir releases during the spawning season) that would accommodate the needs of farmers and, at the same time, preserve the salmon run.

The irrigation districts argue that the court lacked jurisdiction because its orders exceeded the scope of authority reserved in the consent decree. Alternatively, they argue that a pending state court adjudication of Yakima basin water rights deprived the court of jurisdiction.

Substantively, the irrigation districts argue that any water right associated with the Indians' fishing right was abrogated by Congress before the consent decree, or in its settlement. They claim also that the decree is res judicata of any water right.

Jurisdiction[1/]

The district court did not exceed the scope of its retained jurisdiction under the consent decree. Paragraph 20 gave the court jurisdiction "over matters of interpretation of this judgment and matters relating to the administration thereof." Appellants argue that this clause limits the court's jurisdiction to disputes between the parties to the decree.

No such limitation appears. The decree specifically stated that it did not adjudicate the rights of persons not made parties, including the Yakima Nation.[2/] The court properly assumed jurisdiction to interpret the decree in light of the Nations' treaty fishing right.

Nor was the district court required to dismiss the proceeding in favor of a state court action generally adjudicating water rights in the Yakima River basin, State of Washington v. Acquavella, No. 77-2-01484-5 (Yakima Co. Super. Ct., filed Oct. 12, 1977).[3/] Appellants' reliance on Colorado River Water Conservation District v. United States, (Akin), 424 U.S. 800 (1976), is misplaced.

Akin does not hold that a pending state action adjudicating water rights automatically deprives the district court of jurisdiction over issues implicating water. Rather, the Akin Court found only that, based on consideration of several factors,[4/] dismissal of the federal suit in favor of state proceedings was justified by wise judicial administration and efficiency.

Those factors are not present here. In Akin, the parties intended both the federal and state court proceedings to be general adjudications of all water rights in the area. The United States had filed only the complaint when the defendants moved to dismiss it in favor of the state proceeding. Here, the district court interpreted a decree entered by it in 1945. The parties intended no general adjudication of water rights and no party moved to dismiss the federal suit.

We do not find that the district court acted inconsistently in denying removal of the Acquavella action based on the Akin factors while retaining jurisdiction here. As noted above, the two actions have little in common.

Substantive Basis of the Orders

The 1855 Treaty reserved to the Yakima Nation extensive fishing rights. See Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 666-667 (1979)(Yakima treaty secured right to fish at numerous accustomed places, both on and off the reservation), United States v. Winans, 198 U.S. 371, 381 (1905)(Yakima Nation Indians entitled to cross land settled by non-Indians to reach accustomed fishing grounds). The Treaty protects the Nation against restriction of or interference with their reserved rights. United States v. State of Washington, 506 F. Supp. 187, 203 (W.D. Wash. 1980).

The parties to a treaty bear a duty to refrain from actions interfering with either the Indians' access to fishing grounds or the amount of fish present there. Id. The government co :tructed the irrigation project subject to that duty. When its operation of the project threatened further to deplete an already low Chinook salmon run, see United States v. State of Oregon, 657 F.2d 1009 (9th Cir. 1981), it violated its duties under the Treaty.

In the fall of 1980 the regulation of the river water levels interfered with the salmon spawning habits. This violation authorized the district court to correct or offset the damage unless, as appellants argue, the consent decree or prior Congressional action abrogated the Yakima Nations' Treaty fishing right.

Congress may abrogate rights reserved by the Indians, but we do not lightly impute such an intent. Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968). We find no evidence that Congress abrogated or limited the Treaty fishing right.

Appellants point to 1906 administrative action limiting the Indian Irrigation Project (now the Wapato Irrigation Project) to 147 c.f.s. of water for irrigation purposes, and Congressional action in 1914, which raised this amount to 720 c.f.s. Indian Appropriation Act of 1914, ch.222, 38 Stat. 582, 604. Later contracts between the Bureau of Reclamation and the Project increased the Indians' irrigation water allocation.

The Wapato Irrigation Project was a party to the 1945 consent decree which allocated to the Indians 720 c.f.s. without proration, and the additional contract amounts, subject to proration.

We fail to see how determination of the Yakima Nations' entitlement to water for irrigation abrogated or limited their fishing right. Part of the confusion arises from appellants' mischaracterization of the district court's action as recognition of an implied reserved water right.[5/] We do not affirm the district court's orders on the basis of whatever water rights may be reserved to the Yakima Nation to fulfill vital purposes of its Treaty. We base our holding solely on the Nations' Treaty fishing right.

This clarification eliminates appellants' res judicata argument as well. Appellants rely on United States v. Truckee-Carson Irrigation District, 649 F.2d 1286, 666 F.2d 351 (9th Cir. 1981). In Truckee we held that a 1944 general federal water adjudication barred a 1973 action seeking a declaration of a reserved water right in the Paiute Indians for preservation of their fishery in Pyramid Lake and the Lower Truckee River. Not only is no reserved water right implicated in this case, but the 1945 consent decree was not a general adjudication of all water rights in the Yakima River Basin.[6/]

Propriety of the Corrective Measures Chosen

In October 1980, the watermaster and other parties presented the district court with an emergency. The scheduled closing of the dam threatened the redds with destruction. Information on alternative means of preserving the redds was noticeably absent. The court granted the Department of the Interior more time to study the problem and temporarily ordered the water levels maintained in sufficient amount to preserve the redds.

At the second hearing, experts in the field of fish biology testified and suggested actions for preserving the redds other than release of water. One suggested that if 12 of the redds were transplanted, the dam could be closed. The court ordered these measures taken, including transplantation of the endangered redds, construction of berms to divert water into secondary channels, and the opening of some of those channels. Because he was unsure of the effect of these measures, he continued the watermaster's authority to release water as necessary.

We find no abuse of discretion in the court's decision. It properly weighed the interests involved[7/] and the emergency nature of the problem. Given more time in which to solve the problem, the release of water may not have been necessary. But, under these circumstances, the release was justified. We note with approval that the district court, in anticipation of future occurrences, ordered a report on means of meeting irrigation users' needs with less impact on the salmon run.

We affirm the district court's orders.

FOOTNOTES

1/ Although neither side argues that mootness or lack of finality bar our jurisdiction, we must examine this issue on our own initiative. Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908); Willis v. Craig, 555 F.2d 724, 726 (9th Cir. 1977).

We find no lack of finality because we have reviewed similar orders issued by the district court pursuant to its continuing jurisdiction over the consent decree. See Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 626 F.2d 95 (9th Cir. 1980), cert. denied, 449 U.S. 1079 (1981). Nor is this case moot because the challenged orders could not be fully litigated prior to the end of their effective period and the situation may arise again. Weinstein v. Bradford, 423 U.S. 147, 149 (1975)(per curiam).

2/ Paragraph 20 of the consent decree reads in part: "The rights of any claimants to water of the Yakima River or watershed who are not parties to this case shall in no way be prejudiced or affected by this judgment . . . ."

3/ The state, as amicus curiae, also urges this ground for reversal. According to its papers, the United States' motion to dismiss the state proceeding was denied. The United States then petitioned for reconsideration in light of our recent decisions of Northern Cheyenne Tribe v. Adsit, 668 F.2d 1080 (9th Cir. 1982), San Carlos Apache Tribe v. State of Arizona, 668 F.2d 1093 (9th Cir. 1982), and Navajo Nation v. United States, 668 F.2d 1100 (9th Cir. 1982).

Notwithstanding our decisions in these cases, the state court determined that it had jurisdiction over the United States as a representative of federally reserved Indian water rights. This decision was not timely appealed by the United States, but the Sunnyside Valley Irrigation District moved for discretionary review by the state appellate court. As of oral argument in our case, the state appellate court had not accepted review.

4/ The factors weighing in favor of dismissal in Akin were: (1) that the McCarran Amendment evinced a clear federal policy in favor of general, unified water rights adjudication; (2) that the state had a comprehensive system for adjudicating and managing water rights; (3) that the United States had filed only its complaint in federal court before the defendants moved to dismiss in favor of the state proceeding; (4) that over 1000

4/ (continued)

defendants were named, indicating extensive involvement of state water rights; (5) that the federal court was located further from the area in question; and (6) that in other state water divisions, the United States had voluntarily participated in ongoing state water adjudication.

5/ The Treaty's purpose of preserving fishing rights for the Yakima Nation would not have been totally frustrated without the release of water. The temporary lack of water did not threaten either their access to traditional fishing grounds, or the entire salmon run. The possible destruction of redds did threaten to diminish the value of their fishing right, but release of water was not the only apparent solution to prevent the destruction. Compare Cappaert v. United States, 426 U.S. 128 (1976)(District court could not find feasible alternatives for preserving the Devil's Pool and its rare fish other than maintaining the water level in the Pool).

A federal reservation of land contains an implicit reservation of water only if the purposes for which the land is reserved require water. Id. at 139. In Cappaert, the President set aside the Devil's Pool as a national monument because of its historic and scientific value. The reservation of the Pool would have been meaningless, however, if the water level was allowed to drop significantly. Id. at 140.

When pumping of ground water by nearby ranchers lowered the water in the Pool beyond safe levels, the district court enjoined further pumping based on an implied-reserved-water right. The Court affirmed the existence of this right, and further approved the district court's decision that the water in the Pool could drop so long as the necessary level was maintained. The Court held that "the implied-reservation-of-water-rights doctrine . . . reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." Id. at 141 (our emphasis).

Cases use the same analysis in determining whether Indian reservations contain implicit rights to various bodies of water. See Arizona v. California, 373 U.S. 546 (1963)(reserved water right necessary to fulfill agricultural purpose of the land, in amount that will irrigate all practicably irrigable land on the reservation); Winters v. United States, 207 U.S. 564 (1908)(reservation of land useless unless imply a right to sufficient water to irrigate it); Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir.), cert. denied, 102 S. Ct. 657 (1981)(water right necessary to fulfill treaty purpose of ensuring access to fishing grounds). In each case, a guaranteed supply of water was required to preserve the reservation's purposes. Without the reserved water right, others could appropriate the water, frustrating the reservation.

5/ (continued)

Unlike these cases, correction of the redds problem does not require a guaranteed supply of water, to which others may not have access. The government's interference with the water level during the spawning season required the district court to take emergency measures, which included for a time releasing water from the dam. These measures were justified by the government's violation of its Treaty duties, not by any implied-reserved-water-right to water stored in the Cle Elum reservoir.

6/ The 1945 decree resulted from a suit filed by the United States in 1939, seeking a declaration of their responsibilities to various contract holders in the Yakima Irrigation System. Neither side joined the additional parties that would have been necessary for a general adjudication. The final decree settled only the rights of the irrigation districts made party to the proceeding.

In contrast, in Truckee the government framed its complaint in the broadest possible manner. It provided individual notice and widespread publicity of the action. The court gave interested parties every opportunity to present their claims in hearings over several years. The proceeding was adversarial and finally determined the rights of all involved. United States v. Truckee-Carson Irrigation District, 649 F.2d 1286, 1308-1309 (9th Cir. 1981).

7/ At the November 25, 1980 hearing, the district court in fact observed that:

> I don't have any feeling at all that the irrigators in this case would prefer the salmon just disappear. I don't sense that feeling at all. I think they are sincere and legitimate in their concern about the waterflow, but I also feel that they are sincere in their concern for the salmon and, of course, the rights of the [I]ndians in regard thereto.

FILED IN THE
U. S. DISTRICT COURT
Eastern District of Washington

OCT 31 1980

J. R. FALLQUIST, Clerk

Deputy

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KITTITAS RECLAMATION DISTRICT, et al.,

Plaintiff,

v.

SUNNYSIDE VALLEY IRRIGATION DISTRICT, et al.,

Defendants.

Civil No. 21

INSTRUCTIONS TO THE WATERMASTER

THIS MATTER came on regularly for hearing on October 29, 1980, upon a motion on behalf of William G. Gray, the duly appointed and acting Watermaster in this proceeding, for instructions from this Court concerning the proper operation and management of certain reservoir facilities of the Yakima Reclamation Project during the non-irrigation season from October, 1980, to April 1981, in consideration of the provisions of the 1945 consent decree on file in this case and the request of the Yakima Indian Nation that a flow of water in portions of the Yakima River be maintained to protect certain spawning areas for Spring Chinook Salmon in the Upper Yakima River Basin; and

The Watermaster appearing by Robert M. Sweeney, Assistant United States Attorney, and George Dysart, Department of Justice attorney, appearing for the Department of the Interior, and the Yakima Indian Nation appearing by James B. Hovis and Timothy Weaver, Attorneys at Law and various irrigation districts named in the 1945 consent decree appearing by Donald H. Bond, Dennis Fluegge, Robert Frazier, Jay Sandlin, Charles Flower, and Jeffrey Simpson, Attorneys at Law; and

It appearing that it is the usual practice of the Project Manager of the Yakima Reclamation Project, (who is also the Watermaster in this action), to reduce flows from the various Project reservoirs at the end of the irrigation season in mid-October to provide for "carry-over" storage water for use during the next year's irrigation season, which closures significantly reduce the flow of water in the Yakima River; and at the end of the 1980 irrigation season the gates of the Lake Cle Elum reservoir were scheduled for closure on October 20, 1980; and

It further appearing that during the salmon spawning season in late summer of 1980 certain Spring Chinook Salmon migrated up the Yakima River and spawned in certain portions of the upper Yakima River and that some sixty "redds" or spawning areas have been identified in that portion of the Yakima River lying between the entry of the Lake Cle Elum River into the Yakima River, and the Yakima Indian Nation has requested William Gray as Project Manager to maintain a sufficient flow in the afore-described reach of the Yakima River to safeguard the development of salmon fry from the redds, upon the Tribe's assertion that the salmon spawning area in the upper Yakima River Basin is a part of a fishery reserved to the Yakima Indian Nation and it's members pursuant to its treaty with the United States of June 9, 1855, and

It appearing that Mr. Gray has delayed the closing of the Lake Cle Elum Reservoir gates and has met with representatives of the Yakima Indian Nation, the irrigation districts, and the Fish and Wildlife Service of the Department of the Interior, and that the Court has been requested to issue instructions to the Watermaster concerning the management of the facilities of the Project and the waters within the reservoirs and the Yakima River in view of the conflicting interests as to the management

of said waters; and

Attorney George Dysart having requested that some additional time be granted before closure of the reservoir gates in order to allow the Secretary of the Interior to investigate the situation and to consider any possible alternative methods of operation that might be available; NOW THEREFORE, upon consideration of the foregoing,

IT IS ORDERED AND DECREED AND THE WATERMASTER IS INSTRUCTED as follows:

1. That to and until 8:00, A.M., Friday, November 28, 1980, a sufficient flow of water not to exceed 650 c.f.s., (as measured at the Bureau of Reclamation gauging station on the Yakima River at Cle Elum), shall be maintained in that portion of the Yakima River lying between the confluences of the Cle Elum River and the Teanaway to protect and safeguard as nearly as possible the Spring Chinook Salmon Spawning area in that reach of the Yakima River; PROVIDED,

2. That the Watermaster is authorized to regulate the flows in the aforementioned reach of the Yakima River in such amount below 650 c.f.s., (as measured at the Bureau of Reclamation gauging station on the Yakima River at Cle Elum), as the Watermaster may find consistent with the protection of the spawning area after consultation with biologists of the Fish and Wildlife Service of the Department of the Interior and the Yakima Indian Nation; and

3. That further hearing in this matter shall be held at 9:30, A.M., Tuesday, November 25, 1980, at the United States Courthouse in Spokane, Washington or at such earlier time or

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at such other place as may appear appropriate to the Court.

DATED this 31 day of October, 1980.

JUSTIN L. QUACKENBUSH
UNITED STATES DISTRICT JUDGE

Presented by:

/s/
ROBERT M. SWEENEY
Assistant U. S. Attorney

FILED IN THE
U. S. DISTRICT C[illegible]
Eastern District of Washington

NOV 2 8 1980

J. R. FALLQUIST, Clerk
Deputy

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KITTITAS RECLAMATION DISTRICT, et al., Plaintiff, v. SUNNYSIDE VALLEY IRRIGATION DISTRICT, et al., Defendants.	Civil No. 21 SUPPLEMENTAL INSTRUCTIONS TO THE WATERMASTER

THIS MATTER came on regularly for hearing before this Court on November 25, 1980, pursuant to the Order of this Court entered October 31, 1980, directing that a further hearing be held to determine appropriate instructions to be issued to the Watermaster concerning the management of the reservoir facilities of the Yakima Reclamation Project during the non-irrigation period of October, 1980, to March/April, 1981; in view of certain Spring Chinook Salmon spawning beds (hereafter referred to as "redds") having been located in that portion of the upper Yakima River lying between the confluences of the Lake Cle Elum River and the Teanaway River and the Yakima River; and

The Watermaster, William R. Gray, appearing by Robert M. Sweeney, Assistant United States Attorney, and the United States appearing by George D. Dysart, Attorney, Lands and Natural Resources Division, Department of Justice; and the Confederated Tribes of the Yakima Nation, Amicus, appearing by James B. Hovis and Timothy Weaver, Attorneys at Law; and various irrigation districts named in the 1945 consent decree entered in this proceeding appearing by Donald H. Bond, Dennis L. Fluegge, Charles C. Flower, J. Jarrette Sandlin, V. J. Beaulaurier, J. M. McArdle,

Thomas Nelson, Robert M. Leadon, and H. K. Dano, Attorneys at Law.

It appearing to the Court as follows:

1. That in September, 1980, certain return Spring Chinook Salmon migrated up the Yakima River and spawned in portions of the upper Yakima River and fish biologists have located and identified some sixty spawning redds in that reach of the Yakima River lying between the confluences of the Lake Cle Elum River and the Teanaway River; and

2. That following hearing on October 29, 1980, this Court on October 31, 1980, entered Instructions to the Watermaster which, among other things, directed the Watermaster to maintain a flow of water of approximately 650 c.f.s. in that portion of the Yakima River lying between the confluences of the Lake Cle Elum River and the Teanaway River so as to protect and safeguard as nearly as possible the Spring Chinook Salmon spawning redds in that reach of the River; and also directed that further hearing in the matter be held commencing on November 25, 1980; and

3. That certain of the aforementioned sixty salmon redds lying in certain side channels or on the periphery of the Yakima River channel are in immenent danger of damage and that measures could be taken to safeguard these redds by channelization of water flows and transfer of certain redds to more protected areas of the River, if such measures are implemented on an emergency basis; and

4. The United States appeared herein and advised this Court that the Secretary of the Interior, among other things, recommends that sufficient waters be maintained in the Yakima River to provide nearly as possible for the development of the redds and the emergence of fry and that the stream conditions and reservoir releases be monitored to provide such protection as may be appropriate upon the advice of biologists of the United States.

5. That it is appropriate that the provisions of paragraphs 1 and 2, at page 3, of this Court's Instructions to the Watermaster entered October 31, 1980, be continued in effect through the remainder of the non-irrigation season, as supplemented hereafter, NOW THEREFORE,

IT IS ORDERED AND DECREED AND THE WATERMASTER IS INSTRUCTED as follows:

1. That for the remainder of the 1980 to 1981 non-irrigation season, a sufficient flow of water approximating 650 c.f.s. (as measured by the Bureau of Reclamation gauging station on the Yakima River at Cle Elum) shall be maintained in that portion of the Yakima River lying between the confluences of the Cle Elum River and the Teanaway River to protect and safeguard as nearly as possible the Spring Chinook Salmon spawning area in that reach of the Yakima River; PROVIDED, however, that the Watermaster is authorized to regulate the flow in the aforementioned reach of the Yakima River in such amounts below 650 c.f.c., (as measured at the Bureau of Reclamation gauging station on the Yakima River at Cle Elum), as the Watermaster in his discretion may find consistent with protection of the spawning area after consultation with fish biologists of the Fish and Wildlife Service and the Yakima Tribe, and including Doctor Ernest A. Brannon and Dr. Victor W. Kaczynski,

2. That the Watermaster shall consult as soon as possible with the above identified biologists and shall expeditiously undertake such protective measures as the Watermaster finds appropriate, including the following:

a. Transfer of the salmon eggs in those redds (approximately 12) found to be in imminent danger of damage to an appropriate area of the Yakima River as recommended by Drs. Brannon and Kaczynski.

b. Construct berms at the entry into certain side channels to deflect waters into such channels as recommended by Drs. Brannon and Kaczynski.

c. Open the effluent ends of such side channels as recommended by Drs. Brannon and Kaczynski.

3. That the Watermaster shall continue to consult with the above-identified biologists so as to provide for the continuing monitoring of the conditions of the salmon redds and the flows in the Yakima River with the view by the Watermaster in exercise of his informed discretion to provide for reduction in flows of the river insofar as such reduction may be consistent with the protection of the spawning area.

4. That the parties to this matter, and the Watermaster, shall study and report to the Court prior to the 1981 irrigation water delivery season on means by which the needs of the Project water users can be met through more efficient or less extensive use of Project waters or by modification of Project operations or facilities so as to have less impact on the fisheries resource, including the possibility of management of the various Project reservoirs and releases of water so as to provide for appropriate water flows during the spawning and hatching periods that may be practicable while at the same time providing water for irrigation purposes for users within the Project area.

DATED this 28 of November, 1980.

UNITED STATES DISTRICT JUDGE

Presented by:

ROBERT M. SWEENEY
Assistant United States Attorney
Attorney for Watermaster

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WASHINGTON

It appearing, by the report of the Joint Congressional Commission, created under section twenty-three of the Indian Appropriation Act, approved June thirtieth, nineteen hundred and thirteen (Senate Document Number Three hundred and thirty-seven, Sixty-third Congress, second session), that the Indians of the Yakima Reservation in the State of Washington, have been unjustly deprived of the portion of the natural flow of the Yakima River to which they are equitably entitled for the purposes of irrigation, having only been allowed one hundred and forty-seven cubic feet per second, the Secretary of the Interior is hereby authorized and directed to furnish at the northern boundary of said Yakima Indian Reservation, in perpetuity, enough water, in addition to the one hundred and forty-seven cubic feet per second heretofore allotted to said Indians, so that there shall be, during the low-water irrigation season, at least seven hundred and twenty cubic feet per second of water available when needed for irrigation, this quantity being considered as equivalent to and in satisfaction of the rights of the Indians in the low-water flow of Yakima River and adequate for the irrigation of forty acres of each Indian allotment; the apportionment of this water to be made under the direction of the Secretary of the Interior, and there is hereby authorized to be appropriated the sum of $635,000 to pay for said water to be covered into the reclamation fund; the amount to be appropriated annually in installments upon estimates certified to Congress by the Secretary of the Treasury. One hundred thousand dollars is hereby appropriated to pay the first installment of the amount herein authorized to be expended, and the Secretary of the Interior is hereby directed to prepare and submit to Congress the most feasible and economical plan for the distribution of said water upon the lands of said Yakima Reservation, in connection with the present system and with a view to reimbursing the Government for any sum it may have expended or may expend for a complete irrigation system for said reservation.

For operation and maintenance of the irrigation system on lands allotted to Yakima Indians in Washington, $15,000, reimbursable in accordance with the provisions of the Act of March first, nineteen hundred and seven.

Act of August 1, 1914
38 Stat. 582, 604

FILED IN THE
U.S. DISTRICT COURT
Eastern Dist. of Washington
JAN 31 1945
A. A. LaFRAMBOISE, Clerk
Thomas Stenger Deputy

Case # 21
12 Judgment

STATEMENT TO THE COURT

Foreword

This action was instituted for the purpose of having the court determine whether the United States is obligated to deliver water without charge to land within the Sunnyside Valley Irrigation District situated in the Yakima Reclamation Project in excess of that which the Bureau of Reclamation had determined the landowners were entitled to under water contracts which they hold. The court was further requested to determine, assuming that it ruled in favor of the water users, as to the extent and nature of their rights so far as they relate to the rights of other users who are involved in the proceedings.

During the pendency of the instant case the ~~United States Circuit~~ Court of Appeals for the District of Columbia rendered its decision in the case of Fox V. Ickes, 137 F. (2d) 30, certiorari denied, 320 U. S. 792. The court in that case had before it for interpretation and construction the contracts of certain of the users within the Sunnyside Valley Irrigation District. The decision held in effect that the rights of the appellants in the proceedings, under their contracts, were to be determined on the basis of beneficial use and that the Bureau of Reclamation was without authority to increase the charges specified in the contracts of those users. That decision rendered moot the first proposition before the court in the case under consideration and left only the matter of the respective rights of the water users within the project undetermined. Under the circumstances created by the foregoing decision it seemed very desirable to settle amicably the remaining phase of the controversy thus dispensing with extended litigation which would, as a result of cross complaints filed by certain of the defendants, necessitate an adjudication of the Yakima River. Accordingly, negotiations were undertaken which have resulted in the approval of a consent judgment by the attorneys for the litigants.

The proposed judgment in so far as it pertains to the parties before the court grants judicial recognition of those rights in the natural flow of the Yakima River which existed at the time the construction of the Yakima Project was undertaken; it likewise grants recognition of the rights of the users whose claims are based upon contracts with the Bureau of Reclamation; it establishes a formula for proration, dependent upon the nature of the rights involved, during a period when the available supply of water is inadequate to meet the needs of all of the water users; it enjoins and restrains the parties before the court from contesting or otherwise interfering with the rights thereunder recognized; and it retains to the court jurisdiction so far as essential for proper administration and for the purpose of appointing a watermaster if in its discretion such appointment is necessary. The consent judgment does not in any way affect an adjudication as to the priority of the respective water users in the action in so far as they relate to other users of water from the Yakima River who are not litigants. Further, administrative acceptance of the judgment by the interested agencies of the United States, the Bureau of Reclamation and the Office of Indian Affairs, has been expressed.

Summary of Facts and Legal Aspects with Respect to the Rights of the Parties to the Action.

The Yakima Reclamation Project, hereafter referred to as the Project, was originally initiated by the Bureau of Reclamation pursuant to the provisions of the Reclamation Law (43 U.S.C. 371), hereafter referred to as the Reclamation Law. The required investigation of the Project was undertaken in the year 1905 and its construction was started shortly after that date. For the purposes of administration the Project was divided into the Sunnyside Division composed of several irrigation districts, Tieton Division which is administered by the Yakima-Tieton Irrigation District, Roza Division administered by the Roza Irrigation District, Kittitas Division administered by the Kittitas Reclamation District, and the Wapato Division which is situated within the Yakima Indian Reservation.

The normal flow of the Yakima River which constitutes the source of supply for the lands susceptible of irrigation within the Project is insufficient to meet the needs of all the water users during the months of July, August, and September. To remedy this situation the Bureau of Reclamation undertook the construction of storage reservoirs to impound the early spring run-off and flood water. The records kept by the Bureau of Reclamation disclose that the original plans for the development of the Yakima Project contemplated the construction of all five of the divisions to which reference has been made. It further appears that the water for which the United States made its filing of intention to appropriate was for the Project as a whole.

At the time the construction work was initiated, it is still being continued in the Roza Division, lands within the Sunnyside Division in what is now part of the Sunnyside Valley Irrigation District, were being served by the Washington Irrigation Company. The United States acquired the irrigation system of that company subject to the interests of the water users served by the company who held contracts for specific quantities of water. The carrying capacity of the Washington Irrigation Company's canal was at the time of transfer to the United States approximately 630 c. f. s. The rights of these users were based upon a filing made by a predecessor of the Washington Irrigation Company which expressed an intention of the appropriator to ultimately divert 1,000 c. f. s. of water. The transfer to the United States was completed prior to the time that the full 1,000 c. f. s. filed on by the Company was applied to beneficial use and while it was diverting about 815 c. f. s.

In addition to the direct flow right arising from the appropriation of the Washington Irrigation Company, or its predecessor, to which the lands within the Sunnyside Valley Irrigation District are entitled, the United States has in the past recognized an additional 25 c. f. s. known as the Prosser Falls Land & Power Company right.

Pursuant to its plan the Bureau of Reclamation enlarged and extended the canal which it had acquired from the Washington Irrigation Company to serve an additional area approximately as large as the acreage which receives water from the original system. The landowners within the area served by the extended and enlarged canal contracted with the Bureau of Reclamation pursuant to the Reclamation Law for their supply of water. These rights are referred to as public notice rights. Certain of the users within the area who had previously received their supply of water from the original system through contract with the Bureau of Reclamation acquired additional rights to supplement those for which they had already contracted. Such rights are referred to as supplemental rights. Other users refused to contract with the Bureau of Reclamation basing their claims to water on their original contracts with the Washington Irrigation Company. There are, therefore, within the Sunnyside Valley Irrigation District four types of water rights: (a) those based on original contracts with the Washington Irrigation Company; (b) those referred to as supplemental rights; (c) the public notice lands; and (d) Warren Act Lands. Therefore, without including the public notice lands the users within the Sunnyside Valley Irrigation District have water rights aggregating approximately 610 c.f.s. which have in the past been recognized by the United States.

As part of the original development under the Reclamation Law the Bureau of Reclamation undertook the development of the Yakima-Tieton Division. The rights of the users within that Division are identical in character with the public notice rights in the Sunnyside Valley Irrigation District. The division in question has in the past diverted a maximum of about 330 c.f.s. Due to the limited carrying capacity of the system and the large proportionate acreage served by that system, in a normal year the water users receive a supply which is considered to be a minimum for crop production.

Subsequent to the development of the Sunnyside and Tieton Divisions the Bureau of Reclamation constructed additional storage reservoirs to serve the water users within the Yakima Project. Pursuant to the Act of February 21, 1911, Ch. 141, 36 Stat. 925, 43 U.S.C. 523 et seq., hereafter referred to as the Warren Act, the Secretary of the Interior was authorized to contract for the disposition of stored water in excess of the needs of the project, preserving, however, "a first right to land and entrymen under the project." The quoted provision would in the instant case apply to water users in the Sunnyside Valley Irrigation District and the Tieton Division. Although never formally passed upon by the courts, the Warren Act appears to vest in the project users a priority over the Warren Act contractors. In the administration of its projects the Bureau of Reclamation has recognized such a priority between public notice rights and Warren Act rights.

The water which was developed pursuant to the Warren Act was sold under contract to the Kittitas Reclamation District, the Roza Irrigation District, to the irrigation districts within the Sunnyside Division which are set forth in paragraph 3 of the judgment other than the Sunnyside Valley Irrigation District, to those districts referred to in the judgment commencing at paragraph 8 through paragraph 16, exclusive of the Cascade Irrigation District, to the Indian Service and to certain other users not parties to the suit.

In most instances the Warren Act contracts themselves specifically recognize the priority of the water users within the Sunnyside Valley Irrigation District who base their claims to water on contracts originally entered into with the Washington Irrigation

Company. Also the contracts, although somewhat ambiguous on the point, disclose language which might well have been intended to concede to the holders of public notice rights in the Sunnyside Valley Irrigation District and the Tieton Irrigation District a similar priority.

Further, with respect to the rights of the users in the Sunnyside Valley Irrigation District and the Tieton Division, there is no doubt that they had placed to a beneficial use quantities of water at least equal to that which they will receive pursuant to the proposed consent judgment which will not be subject to proration with Warren Act users.

In addition to the water rights to which reference is made above, there is involved in the litigation the right of the Yakima Indian Reservation to a supply of water from the Yakima River. By the Act of August 1, 1914, Ch. 222, 38 Stat. 582, the Congress of the United States claimed for the tribe in question 720 c.f.s. of water in the low water flow of the Yakima River. Over and above the 720 c.f.s. the Yakima Reservation receives 350,000 acre feet of water pursuant to agreements entered into between the Bureau of Reclamation and the Office of Indian Affairs. These later rights are derived from water made available as the result of the furnishing of storage capacity under the Warren Act. In the proposed consent judgment, the rights last mentioned to which the Indians are entitled are considered in the same light and are subject to the same limitations as other Warren Act rights.

Over and above the foregoing rights there is another class of claims to water from the Yakima River which are affected by the judgment. They, like the claims of the Washington Irrigation Company and the Prosser Falls Land & Power Company claim, were initiated prior to the time that development of the Yakima Project was undertaken. In most instances these claimants by instruments called

limiting agreements, executed in consideration of the construction of the project by the United States, defined the maximum quantities which those users would divert from the source of supply under their appropriation. The judgment recognizes these claims and also the rights of other claimants on the river who, although having refused to sign limiting agreements, have perfected rights of which the Bureau of Reclamation has always taken cognizance.

A factor important in attaining the settlement contained in the proposed judgment was the willingness of the Kittitas Reclamation District to release back to the United States certain of the water which it presently holds under contract for sale to other districts within the Project. The interest or responsibility of the United States, however, is not affected by transfer of the rights as it will merely look to the purchasers for the payments which the Kittitas District was formerly obligated to make.

The consent judgment provides a basis of apportionment of the available supply of water which has been agreed to by the principal diverters from the stream. By the entry of the consent judgment there will be established a basis upon which the Bureau of Reclamation or a watermaster if one is appointed may divert to the users quantities of water agreed upon by them without the danger of encroaching upon the legally constituted rights of other users within the Project. Briefly the consent judgment as drafted fixes the rights of the parties as among themselves as follows:

(a) There is recognized in the Sunnyside Valley Irrigation District a right to 725 c.f.s. of water which will not be subject to proration with the Warren Act users in a period of shortage. Of this quantity 50 c.f.s. may be measureable return flow from the Roza Division thereby effecting what may in the future be an appreciable reduction of that district's claim to water from storage and natural

flow. It has been estimated by the Bureau of Reclamation that the recognition in the Sunnyside Valley Irrigation District of a right to 725 c.f.s. undiminished in a period of inadequate supply will insure that district of a quantity of water within 6% of normal during a period of one-third shortage.

(b) There is recognized in the proposed consent judgment the rights of the Tieton Division to 250 c.f.s. which has the same status as the rights of the Sunnyside Valley Irrigation District which are exempt from proration. This is a reduction of 80 c.f.s. from the maximum quantity which that division has in the past diverted. If the judgment is entered as drafted in a period of one-third shortage it has been estimated by the Bureau of Reclamation that the division in question would experience a reduction from normal of approximately 10%. However, there has been transferred 18,000 acre feet from the Kittitas Reclamation District to the Tieton Division. It is probable therefore that the Tieton Division will not be forced to experience any reduction below normal supply in a period of extreme shortage.

(c) The Indian Service, for reasons above expressed, will receive an undiminished right to 720 c.f.s. The comments made with respect to the Warren Act users hereafter set forth will apply to the balance of the rights to which the Indian Service is entitled under the judgment.

(d) All of the rights to direct flow which have previously been recognized by the United States other than those specified are likewise exempt in full from proration by the judgment in so far as Warren Act users are concerned.

(e) The judgment recognizes the rights of Warren Act contractors to water in the amount specified in their contracts subject to the priorities set forth in the foregoing paragraphs (a), (b), (c), and (d). In a period of shortage these users must ultimately

accept a proportionate reduction based on a formula set out in the judgment. The rights of the Sunnyside Valley Irrigation District and the Tieton Division, except as to the quantities exempt from proration, will likewise be subject to reduction based on the same formula.

The parties to the suit are, by the judgment, enjoined from asserting claims against each other or their successors and assigns in so far as the water rights covered by the judgment are concerned. The judgment does not, however, affect the rights of such parties or users who are not within the jurisdiction of the court in the present proceeding. In addition, provision is made for the appointment by the court, if in its discretion such appointment is necessary, of a watermaster to be vested with such authority as the court deems appropriate in the administration of the Yakima Project. The court further retains jurisdiction over matters arising in the administration of the rights of the parties affected by the judgment and for the purpose of interpreting the provisions set forth in the judgment.

Edmund T. Kennedy
U.S. Atty

William H. Veeder
Department of Justice

R. J. Hill
Asst Regional Counsel
Bureau of Reclamation

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF WASHINGTON

SOUTHERN DIVISION

Kittitas Reclamation District, et al, Plaintiffs,	)	
vs.	)	Civil Action No. 21
Sunnyside Valley Irrigation District, et al., Defendants.	)	

IN THE MATTER OF THE ENTRY OF A CONSENT DECREE.

BE IT REMEMBERED that the above entitled and numbered cause came on for hearing in the matter of the entry of a consent decree, before the Honorable L. B. Schwellenbach, Judge of the above entitled court, sitting at Yakima, Washington, at the hour of 9:10 o'clock p. m., January 31, 1945, the parties hereto appearing as follows: Mr. Edward M. Connelly, United States Attorney for said District, appearing for the United States of America; Mr. D. G. Tyree, Assistant Regional Counsel, Bureau of Reclamation; Mr. William H. Veeder, Attorney for the Department of Justice; Mr. F. A. Kern, appearing on behalf of the Kittitas Reclamation District; Mr. Hugo F. Luhman, appearing on behalf of Selah & Moxee Irrigation District, Terrace Heights Irrigation District, and Yakima Reservation Irrigation District; Mr. V. O. Nichoson, appearing on behalf of Roza Irrigation District; Mr. C. P. Short, appearing on behalf of the West Side Irrigating Company and Cascade Irrigation District; Mr. John H. Lynch, appearing on behalf of

Broadway Irrigation Company; Mr. Stephen E. Chaffee, appearing on behalf of Sunnyside Valley Irrigation District, Christina Mariea, Luis Luccolini and Euffemia Luccolini, his wife, Mazine E. Fox and Josie R. Fox, his wife, Elmer A. Bacon and Artie Bacon, his wife, Phillip Louis Parks and Ollie D. Parks, his wife, Grandview Irrigation District, Granger Irrigation District, Prosser Irrigation District, Snipes Mountain Irrigation District, Outlook Irrigation District, Yakima-Tieton Irrigation District, Tieton Water Users Association, and Zillah Irrigation District;

WHEREUPON the following proceedings were had, to-wit:

MR. CONNELLY: May it please the Court, in the case of Kittitas Reclamation District, and others, vs. Sunnyside Valley Irrigation District, and others, being Civil Cause No. 21, I wish to present to the Court the motion of the United States for an order for joinder of a new defendant. The new defendant is the Cascade Irrigation District. I am basing the motion upon the consent of the directors of that district, previously filed, to the entry of such an order, making the Cascade Irrigation District a party to this action. Later it will appear that the Cascade Irrigation District consents to the entry of a decree which includes it as a codefendant.

THE COURT: All right; I will sign this order.

MR. CONNELLY: I now wish, if Your Honor please, to move the admission to practice in this court, for the purposes of this proceeding only, Assistant Attorney General William H. Veeder, of the Lands Division of the Department of Justice, at Washington, D. C., and D. G. Tyree, Assistant Regional Counsel of the Bureau of Reclamation. They are the attorneys who with these other gentlemen have effected this settlement, and who have worked out the details, and who, if the Court wishes to ask for details concerning the provisions of the decree, would be better fortified to answer them than I would be.

THE COURT: The motion to appear in this case is granted.

MR. CONNELLY: This was read to me after it was signed. I knew what it is, Your Honor. I would like to file it, with a motion for entry of final judgment in the action referred to, and in order to show the consent of Harry Olson, and the clients whom he represents, I would like to file this telegram, with the motion for entry of final judgment, which I now hand to the Court, with the proposed judgment attached, and this, I understand, is on the agreement that Mr. Olson will sign the formal motion when he returns to Yakima.

We have prepared a rather extended summary of this judgment, if Your Honor please, but I believe that the preliminary statement of facts to the court, and the

concluding statement of the order and judgment itself, together with any information which the Court may wish to elicit from the counsel who have worked extensively and actively on it, or from Mr. Ball, would suffice, rather than the reading of this ten-page statement.

THE COURT: I want to say this, as you all recognize this is a very important piece of litigation, which has been prosecuted in a number of courts in its different aspects for a number of year. I do not anticipate that it will be possible for me to familiarize myself with all of the facts which are involved in this litigation. I do not anticipate that there will be any necessity for that. However, I do take this position in this case, as I have in every case, that I have the responsibility of knowing what I am doing when I sign my name to an order or judgment or decree. I have to understand what it is about. When counsel for the various parties get together and effect a settlement, my attitude is one of the utmost sympathy with settlement. I do not ask for an explanation with the idea of interposing an objection to it, but for the simple reason that I believe if I sign a judgment in this case, even though it has been agreed to by all the parties, that I have the responsibility of knowing what it is about, and I want a sufficiently complete statement so I will be satisfied in my own mind

I am doing what I should do.

MR. CONNELLY: I shall read all I have then. I was economizing on time.

THE COURT: Do not read it too fast.

MR. CONNELLY: I shall not, Your Honor.

This action was instituted for the purpose of having the Court determine whether the United States was obligated to deliver water without charge to land within the Sunnyside Valley Irrigation District situated in the Yakima Reclamation Project in excess of that which the Bureau of Reclamation had determined the landowners were entitled to under water contracts which they hold. The court was further requested to determine, assuming that it ruled in favor of the water users, as to the extent and nature of their rights so far as they relate to the rights of other users who are involved in the proceedings.

During the pendency of the instant case the Court of Appeals of the United States for the District of Columbia rendered its decision in the case of Fox v. Ickes, 137 F.(2d) 30, certiorari denied, 320 U. S. 792. The court in that case had before it for interpretation and construction the contracts of certain of the users within the Sunnyside Valley Irrigation District. The decision held in effect that the rights of the appellants in the proceedings, under their contracts, were to be

Page 5, line 6, through page 17, line 8, consist of a verbatim reading by Mr. Connelly of the "Statement to the Court" reproduced at pages A-36 to A-44 of this Appendix.

ment by the court, if in its discretion such appointment is necessary, of a watermaster to be vested with such authority as the court deems appropriate in the administration of the Yakima Project. The court further retains jurisdiction over matters arising in the administration of the rights of the parties affected by the judgment and for the purpose of interpreting the provisions set forth in the judgment.

I would like to file that in the proceedings.

THE COURT: All right. Let us start out with this Indian business. Is that all in the Wapato Division, Mr. Veeder? I say, are all the Indian rights under that?

MR. VEEDER: Yes, sir; paragraph 4, page 15 of the judgment.

THE COURT: In this 1914 Act the 720 cubic feet of water per second is the amount Congress fixed?

MR. VEEDER: Yes, sir. I might call attention to the fact that the judgment has been reviewed by the Department of the Interior, which represents the Indian Service, and all the articles have been reviewed and approved.

THE COURT: Do you consider that you represent the point of view of the Indian Service, Mr. Tyree?

MR. TYRCO: No, sir.

MR. VEEDER: The Department of Justice represents the Indian Service, and Mr. Tyree represents the Bureau of Reclamation

THE COURT: In addition to this 720 cubic feet they have

350,000 acre feet, and the judgment provides for 250,000 acre feet, and 100,00 acre feet.

MR. VEEDER: Yes, Your Honor. There are two contracts, one the original contract for 250,000--I beg pardon--in the contract of March 9, 1921, there are 250,000 feet, and subsequent to that a contract for 100,000 feet was entered into, making an aggregate of 350,000.

THE COURT: When it says "the agreement of March 9, 1921, as amended by the agreement of September 3, 1936", that means instead of being 250,000 feet, it was 350,000.

MR. VEEDER: No; that is the amendment in the contract. In the contract it is 250,00 acre feet, and on page 14, the final paragraph, there is set forth a reference to the other contract which was entered into on September 3, 1936, for 100,000 acre feet.

THE COURT: That is an amendment.

MR. VEEDER: No; that is another contract.

THE COURT: There are two contracts on September 3, 1936?

MR. VEEDER: That is correct.

THE COURT: Do these contracts, in so far as they refer to the 250,000 feet, or the 250,000, plus the 100,000 feet, recognize that the rights of the Indians were subject to the same limitations as anyone else, under the Warren Act?

MR. VEEDER: Yes, sir. There is a provision in the contract that is is subject to proration.

THE COURT: So the 1945 contract does not add any new element.

MR. VEEDER: That is right.

THE COURT: All right. Turn to page 2 of this statement. What I want to do is to go from this statement to the judgment. Where the statement says something, I want you to show me where the judgment covers it. Maybe we had better do that further along in the statement.

MR. VEEDER: Page 7.

THE COURT: "The consent judgment provides a basis of apportionment of the available supply of water which has been agreed to by the principal diverters from the stream. By the entry of the consent judgment there will be established a basis upon which the Bureau of Reclamation, or a watermaster, if one is appointed, may divert to the users quantities of water agreed upon by them without the danger of encroaching upon the legally constituted rights of other users within the Project." Where is this watermaster provision?

MR. VEEDER: That is the final paragraph on page 30.

THE COURT: You did not feel it necessary or proper to have anything in the judgment which would establish any procedure by which the Court could appoint a watermaster?

MR. VEEDER: That was left entirely to the discretion of the Court, on application by the interested water users.

THE COURT: Well, suppose I wake up some morning and conclude

I want a watermaster?

MR. VEEDER: I think the judgment provides you could appoint one

THE COURT: I was wondering if you should not have some provision that somebody ought to ask for it before the Court could appoint a watermaster.

MR. VEEDER: We went into rather an extended discussion at that time among the attorneys, and I think it was the consensus that if at any time it was not on the water users' desire, it would be on your own motion. The Court could appoint a watermaster. The mechanics were not set up.

THE COURT: It has received full consideration?

MR. VEEDER: I think it has. That was fully discussed.

THE COURT: All right. Then start at the bottom of page 7: "There is recognized in the Sunnyside Valley Irrigation District a right to 725 cubic feet per second."

MR. VEEDER: The reference to the Sunnyside Valley Irrigation District will be found at page 28 at the top of the page, subparagraph 5.

THE COURT: Mr. Chaffee, is it in accordance with the understanding of the Sunnyside Valley Irrigation District that the estimate of the Bureau of Reclamation of 725 cubic feet per second will keep within 6% of normal?

MR. CHAFFEE: It is substantially that, if the Court please. You see, the Sunnyside Valley Irrigation District has about 77,000 acres. There will be some run-back from

Roza. I might state while I am on my feet, in connection with the Sunnyside Valley Irrigation District, in reference to this point, and the other points involved, that that judgment is very satisfactory, because it in substance recognizes all the Sunnyside Valley Irrigation District has contended for over a period of twelve years' litigation. First, it recognizes beneficial use or past use as the measure of water rights. Second, the contract entered into provides there shall be no additional construction charge, and, third, it recognizes the rights of priority that substantially protects the rights-- it is so nearly up to the full amount that it is far better for the Sunnyside Valley Irrigation District to accept it than to litigate for additional priority--and, as a matter of fact, it is all the Sunnyside Valley Irrigation District has contended for.

This litigation arose really on three different points. First, the issuance of a public notice deprived the Sunnyside Valley Irrigation District water users of 25% of their rights, and charges them with a million dollars of construction charges, and, third, refuses to recognize any priority.

Now, this judgment, in the judgment and in the contract--and, by the way, in most of these districts a contract containing the same provisions that are contained

in this consent judgment, have been voted on favorably by the water users. The Tieton Water Users Association, which I represent, the vote was twenty to one in favor of the proposed settlement, and at least two or three to one in all the rest of the districts; but in substance this decree and the contract trant all of the relief we asked as to the measure of our rights in a normal year, and also no additional construction costs, and, thirdly, the full amount--or nearly, within 6 to approximately 8% in a year of water shortage, where there is a 33-1/3 shortage. And we have some other rights to waste water, and we are below the road to a certain extent, and I might say for the Sunnyside Valley Irrigation District--and I might say I am one of the proposers of this consent judgment in the first instance, and representing the Tieton Water Users Association, it is very highly satisfactory.

It was submitted to the Board of Directors and passed upon unanimously by the Trustees of the Water Users Association, and passed upon unanimously in favor of it by the Tieton Water Users at an annual meeting.

And so this proposed settlement has been carefully considered at the meetings of the Sunnyside Valley Irrigation District. There was a series of meetings held prior to the time the contract was voted on, and it was fully

explained, and the Directors sent out a statement explaining the settlement, and these water users of the various districts up and down the Valley are thoroughly acquainted with it, and they are in favor of the settlement.

In my opinion it is the most fair and equitable adjustment that could be obtained, saving expensive litigation. This will release some of the Kittitas water supply and supplement the Tieton, so the Tieton would not be the bottleneck, and receive approximately the full amount in a short-water year--the full amount that they needed, to keep their orchards alive. That is something that could not be worked out by litigation. The small districts receive 12,000 feet additional supply. That will give them a greater base to prorate on. Some things that might have been sore spots have been ironed out in this proposed consent judgment, and it covers the situation quite completely, and in effect there is an adjudication of the water rights of the Yakima River and its tributaries.

I do not think such a thing has ever been worked out before, where there are water rights so extensive as in the Yakima River, and adjudicated by a consent judgment like this, and this is probably the last one of any consequence to be adjudicated. It seems to me it is a very happy solution of this dispute that has been extending for a long period of years, and I think it will work out

to the benefit of the Yakima Valley as a whole and the water users in the Valley.

THE COURT: At the bottom of page 27, the 250,000 cubic feet per second, Tieton?

MR. CHAFFEE: That is very satisfactory to the Tieton people, as I said.

THE COURT: Now "B", page 8, Mr. Veeder?

MR. VEEDER: This is referred to as the limiting agreement, which at the time of the institution and construction of the Yakima Project was signed by the users that had a direct flow at the time the construction was started.

This judgment leaves these rights intact, and recognizes they are subject to judicial recognition. Those limiting agreement rights were very largely covered by contracts which the water users had. In other words, when they contracted for certain storage rights, the contract also recognizes the rights they had to the direct flow from the Yakima River.

THE COURT: That is covered by the paragraph on the top of page 20?

MR. VEEDER: Yes, Your Honor.

THE COURT: Does that answer the question that I have to ask sometime? You have an agreement here between certain water users by districts. I do have to be sure you have not

taken away from people who are not parties to this action their rights in the division between the parties to the action.

MR. VEEDER: We have tried to cover that very explicitly throughout the judgment, and we have made a provision that these rights that are not covered are in no way affected. That is set forth in paragraph No. 20.

THE COURT: "The rights of any of the claimants to water of the Yakima River."

MR. VEEDER: It is on page 20.

THE COURT: That is what I am reading" The rights of any of the claimants to water of the Yakima River or water shed who are not parties to this cause, shall in no way be prejudiced or affected by the judgment, nor will it in any way prejudice or affect the rights of the parties to this judgment as they may pertain to the rights of such claimants."

I do not want to be hypertechnical, but I am wondering if the words "of the" in the next to the last line, on page 20, should not be deleted. Should it not be "the rights of any claimants to water"? In the first sentence you say: "This judgment shall constitute a final determination of the obligation of the United States to deliver water from the Yakima River and its tributaries", and in

the second paragraph: "Each of the parties to this cause, their grantees, successors and assigns, are by this judgment forever enjoined and restrained from asserting any claim to or from interfering with the use or the delivery of those quantities of water which are recognized in this judgment."

Now, for the pprpose of this analysis, leave out the first sentence, because that does not refer to it. You go on to say"The rights of any of the claimants to water". You are referring up above to claims for water."The rights of any claimants to water of the Yakima River or water shed who are not parties to this cause."

MR. VEEDER: Striking out"of the" immediately after the word "any". I think your suggestion improves the sentence.

THE COURT: I do not want to do it unnecessarily, or if it might change the meaning of it. You are referring to claims up above "Each of the parties to this cause are enjoined from asserting any claim". They are not claimants and they are enjoined, and you go on "The rights of any of the claimants to water who are not parties." You have the rights to any claim. You would eliminate the possibility it might refer back to the second sentence of that paragraph.

MR. VEEDER: I think that would improve it. I see no reason why it should not be done.

THE COURT: We will tentatively leave that out. "The judgment recognizes the rights of Warren Act contractors to water in the amount specified in their contracts subject to the priorities set forth in the foregoing paragraphs a, b, c and d. In a period of shortage these users must ultimately accept a proportionate reduction based on a formula set out in the judgment." "The judgment recognizes the rights of Warren Act contractors to water in the amount specified in their contracts." I would like to have you show me the part of the judgment supporting that statement.

MR. VEEDER: The judgment throughout recognizes the Warren Act rights by a resume in each paragraph, which contains various amounts, and those users are Warrent Act users, and the quantity of water specified in each of those paragraphs is the amount of water the users are entitled to under their contract.

Now, the judgment recognizes certain preferential rights. The 725 cubic feet per second in the Sunnyside Valley Irrigation District; the Tieton Division, 250 cubic feet per second; the Indian Service, 720 cubic feet per second. The Warren Act contractors' rights will be forced to prorate in a period of shortage, whereas under the judgment those holding the preferential rights will not be forced to prorate. The provisions for proration appear

in paragraph 18, on page 26, in which it is specified these waters which will be subject to proration. In other words, all the rights that are referred to in paragraph 18 which will have to sustain a prorata diminution in case of shortage pertain to Warren Act users. The remaining ones have the preference, in accordance with the judgment.

THE COURT: All right. Now, Mr. Kern, I would like to have a statement from you. You are furnishing the wherewithal. I want a statement in the record of the attitude of the Kittitas Reclamation District.

MR. KERN: I might say this, before there was any work in connection with trying to work out this consent decree, we had had negotiations with the Tieton Project to sell them some of our water.

The acreage in the Kittitas Reclamation District has been reduced on point classification of the land, and we would have this additional water, and we were glad to dispose of it, and then our schedule was changed. We had a very large excess of water before the first of July, and we had to use up 40% of our water by the first of July, so that we only had 60% after the first of July. We did not use the 40%, and that changed our schedule and permitted us to use 3% more after the first of July than before the first of July, and that gives us more water after the first of July, and that caused 20,000 acre feet

of water to be taken from our supply before the first of July, and 10,000 after the first of July, and with that change in the schedule it left us in very good shape.

We are very well satisfied with the consent decree as drawn.

THE COURT: All right. I would like to have the record show specifically all of the signatories to the motion who are here. Moulton & Powell are not here. I would like to have the record show who are here.

THE CLERK: I have all of the attorneys who are here.

THE COURT: I would like to have the record show it, so Mr. Ridenour's record will show who is here participating in the actual presentation of this matter.

THE CLERK: I have those appearing: Mr. D. G. Tyree, Assistant Regional Counsel, Bureau of Reclamation; William H. Veeder, Attorney for the Department of Justice; Edward M. Connelly, appearing for the United States of America; F. A. Kern appearing on behalf of the Kittitas Reclamation District; Hugo F. Luhman, appearing for Selah & Moxee Irrigation District, Terrace Heights Irrigation District, and Yakima Reservation Irrigation District; V. O. Nichoson, appearing for Roza Irrigation District; C. P. Short, appearing for West Side Irrigating Company, and Cascade Irrigation District; John H. Lynch, appearing for Broadway Irrigation Company; Stephen E. Chaffee, appearing for

Sunnyside Valley Irrigation District, and a number of other parties. I have not had time to copy them off the motion.

THE COURT: Is there any one of the counsel who feels there is any matter you want to present now, any discussion you want to bring up, or any questions you want to ask?

MR. LYNCH: If Your Honor please, I represent a small company that purchased 700 acre feet of water, a private corporation, a community corporation. It is not organized in a district. We have there a contract for the purchase of Warren Act water, and it contains general provisions for a proration of the water in short years, but the method to be pursued in making that proration is not definitely specified.

As to all those Warren Act water users, if they are all on the same plane we have no objection to being bound by the consent decree, but if it happens that some of these Warren Act users are given priority, and transferred from one section to the other, and given priorities to Warren Act water held by some other districts, or something, I would like to have that cleared up, if there is any such preference.

As I recall it, there are certain waters that were sold by the Kittitas Reclamation District from Warren Act water, is that right?

MR. KERN: Yes.

MR. LYNCH: A portion having been released by the District, and will be apportioned to other companies or districts or users, such as the Tieton, and perhaps some on the Reservation and some others.

Is it or is it not a fact that those transfers under the Warren Act will give the advantage in prorating over the other companies or districts which have water contracts?

MR. CHAFFEE: None whatever.

MR. VEEDER: There is no preference; they are all in the same position.

THE COURT: Does anyone else want to present a question?

MR. VEEDER: What about the language at the bottom of page 29?

THE COURT: I am going to sign this, and if you gentlemen decide you want to leave it the way it is, it is all right with me, or if you decide it might be desirable to eliminate these two words, that may be done. But I will sign the judgment. I do not want to do anything which might materially change the meaning of the judgment. It just seemed to me there might be some desirability to that, but you gentlemen can talk about it and decide what you want to do.

MR. CHAFFEE: It is okeh with me. I think it would clarify it.

MR. CONNELLY: I think it would clarify it, and I think the suggestion is a good one.

THE COURT: If it is satisfactory to everybody, I will cross out the words "of the" and make it read "The rights of any claimants to water".

I want to congratulate you gentlemen and to thank you. The possibility of trying to adjudicate these water rights for the rest of my life has been hanging over me since May, 1942, and I have had in mind that when we got through with these Hanford cases I would have to start on this matter. I know I could appoint a master, which is all right, but a couple of times a month the lawyers would decide the master needed instructions or something, and I looked forward to a ten-year job. I did not relish it very much, but I think you gentlemen are to be congratulated. Personally, I wish to thank you.

STATE OF WASHINGTON)
COUNTY OF SPOKANE)ss.

I hereby certify that the foregoing is a true and correct transcript of the proceedings therein shown, and the whole thereof, as reported by me in shorthand at the time and place hereinbefore stated.

Dated at Spokane, Washington, this 11th day of February, 1945.

(Signed) Egan Ridenour

Official Court Reporter.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE

EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

FILED IN THE
U. S. DISTRICT COURT
Eastern District of Washington

JAN 31 1945

A. A. LaFrenchise

Deputy

KITTITAS RECLAMATION DISTRICT;
SELAH & MOXEE IRRIGATION DISTRICT; and
UNITED STATES OF AMERICA,

Plaintiffs,

vs

SUNNYSIDE VALLEY IRRIGATION DISTRICT;
CHRISTINA MARIA EDER;
LUIS LUCCOLINI and EUFFEMIA LUCCOLINI, his wife;
MAZINE Z. FOX and JOSIE R. FOX, his wife;
ELMER A. BACON and ARTIE BACON, his wife;
PHILIP LOUIS PARKS and OLLIE D. PARKS, his wife;
ROZA IRRIGATION DISTRICT;
YAKIMA RESERVATION IRRIGATION DISTRICT;
YAKIMA-TIETON IRRIGATION DISTRICT;
TIETON WATER USERS' ASSOCIATION;
GRANDVIEW IRRIGATION DISTRICT;
GRANGER IRRIGATION DISTRICT;
PROSSER IRRIGATION DISTRICT;
SNIPES MOUNTAIN IRRIGATION DISTRICT;
SUNNYSIDE IRRIGATION DISTRICT;
ZILLAH IRRIGATION DISTRICT;
BROADWAY IRRIGATION COMPANY;
MOXEE DITCH COMPANY SUB-A;
NACHES-SELAH IRRIGATION DISTRICT;
TERRACE HEIGHTS IRRIGATION DISTRICT;
UNION GAP IRRIGATION DISTRICT;
WEST SIDE IRRIGATING COMPANY;
YAKIMA VALLEY CANAL COMPANY;
OUTLOOK IRRIGATION DISTRICT; and
CASCADE IRRIGATION DISTRICT,

Defendants.

NO. 21

J U D G M E N T

The above-entitled cause having come on for hearing and it appearing to the Court that the plaintiffs and the defendants have concluded and settled all issues in this cause; that the parties hereto have joined in a Motion for Entry of Judgment; that the provisions hereafter set forth in this judgment consitute the agreement of the parties with respect to such issues; and that upon consideration of the record herein and the Motion for Entry of Judgment the Court finds that the Motion for Entry of Judgment should be granted:

NOW, THEREFORE, it is ordered, adjudged and decreed as follows:

1. The defendants, Christina Marica Eder, Luis Luccolini and Euffemia Luccolini, his wife, Maxine Z. Fox and Josie R. Fox, his wife, Elmer A. Bacon and Artie Bacon, his wife, Philip Louis Parks and Ollie D. Parks, his wife, and the Yakima Reservation Irrigation District are dismissed as defendants in this cause.

2. The obligations of the United States to deliver water from the natural flow of the Yakima River, and its tributaries, from storage in its various reservoirs on the Yakima watershed, and from other sources, to the plaintiffs, to the defendants, and to the lands within the Wapato Indian Irrigation Project, are as set forth hereafter in this judgment.

3. SUNNYSIDE DIVISION.--The United States shall divert each year into the Sunnyside Main Canal, hereafter referred to as the Sunnyside Canal, to supply the water rights of the parties entitled to receive water from the Sunnyside Canal in the Sunnyside Division, a total quantity of 449,520 acre-feet of water on the following monthly schedule:

	Average Rate of Diversion in Cubic Feet per Second	Diversion in Acre-feet
April	895	53,230
May	1,209	74,340
June	1,280	76,150
July	1,290	79,300
August	1,290	79,300
September	995	59,190
October	456	28,010
		449,520

The foregoing schedule of diversions shall be increased commensurate with the quantities of water to be acquired from the United States by the Grandview, Outlook, Granger, Prosser and Sillah Irrigation Districts, as set forth in paragraph 6 of this judgment: Provided, however, that the water acquired by those Districts shall not be diverted into the Sunnyside Canal when to do so would augment the

schedule of diversions in excess of the safe carrying capacity of the Canal.

(a) SUNNYSIDE VALLEY IRRIGATION DISTRICT.--The United States shall divert annually into the Sunnyside Canal a total quantity of 340,944 acre-feet of water to supply the water rights of said District and the water users within the District, including water users who have no water right applications or contracts with the United States, on the following schedule:

	Average Rate of Delivery in Cubic Feet per Second	Delivery in Acre-feet
April	658	39,159
May	901	55,409
June	960	57,089
July	973	59,798
August	983	60,439
September	753	44,780
October	612	24,270
		340,944

(b) PROSSER IRRIGATION DISTRICT.--The United States shall divert into the Sunnyside Canal 7,347 acre-feet of water annually, which quantity of water includes estimated losses in said Canal between the point of diversion and the point of delivery, and the United States or its successor in the operation of the said Canal shall deliver pursuant to the contract dated December 1, 1917, with the Prosser Irrigation District, at Mile 55.05 and Mile 59.32 of the Sunnyside Canal in an amount not exceeding the following schedule:

Month	Acre-feet per acre
April	0.40
May	0.48
June	0.56
July	0.58
August	0.58
September	0.40
Total	3.00

The annual irrigation season shall be from April to September, inclusive, and the maximum rate of flow at the said points of delivery during any one month shall not exceed the following schedule:

April	14	second-feet
May	16	" "
June	21	" "
July	21	" "
August	21	" "
September	14	" "

Provided, however, that water solely from the natural flow of the Yakima River will be delivered by the United States during October, if desired by the District and found available by the officer in charge of the administration of the water supply for the Yakima project.

The United States or its successor in the operation of the said Canal, in accordance with the contract of June 1, 1925, with the Grandview Irrigation District and the Prosser Irrigation District, shall deliver to the Prosser Irrigation District for use upon the 15.21 acres of land, to which reference is made in said contract, 2.75 acre-feet of water per acre; and the amount of water to be delivered to the Grandview Irrigation District pursuant to its contract with the United States, dated August 4, 1915, shall be reduced by the proportional amount applicable to the said 15.21 acres and the amount of water to be delivered by the United States pursuant to its contract with the Prosser Irrigation District dated December 1, 1917, shall be correspondingly increased.

The foregoing quantities of water for the Prosser Irrigation District shall be increased 2,500 acre-feet upon the execution of a contract for the acquisition of that quantity of water by the District and the United States as provided in paragraph 6 of this judgment. The increased quantity of water shall not, however, be diverted into the Sunnyside Canal when to do so would augment the schedule of diversions in excess of the safe carrying capacity of the Canal.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

(c) SNIPES MOUNTAIN IRRIGATION DISTRICT.--The United States shall divert into the Sunnyside Canal 9,247 acre-feet of water annually, which quantity of water includes estimated losses in said Canal between the point of diversion and the point of delivery, to supply the amounts of water provided for by contracts between the United States and the Snipes Mountain Irrigation District dated November 16, 1914, and July 11, 1931. There shall be delivered by the United States or its successor in the operation of the Sunnyside Canal a total of 5,265 acre-feet, pursuant to the contract dated November 16, 1914, between the United States and the Snipes Mountain Irrigation District, at the following points on the Snipes Mountain Canal: (a) at Mile 9.05, (b) at Mile 10.20, and (c) near Mile 6.42. The annual irrigation season shall be from April to September, inclusive; the maximum rate of flow at the said points of delivery which the District may demand during any one month, based on the following schedule, shall be 17.7 cubic feet per second and the monthly supply of water shall not exceed the following monthly schedule of deliveries:

Month	Acre-feet Total of Contract
April	685
May	840
June	1050
July	1065
August	950
September	685
Total	5265

Provided, however, that water solely from the natural flow of the Yakima River will be delivered by the United States during October, if desired by the District and found available by the officer in charge of the administration of the water supply for the Yakima project.

In addition to the water supply provided for in said contract of November 16, 1914, the United States or its successors in the operation of the Sunnyside Canal pursuant to a contract dated July 11, 1931, with the District, shall deliver annually a total of 2574 acre-feet at

the following points: (a) Mile 9.05 of the Snipes Mountain Canal; (b) at Mile 1.15 of the West Branch of the Snipes Mountain Canal; and (c) near Mile 6.42 of the Snipes Mountain Canal. The annual irrigation season shall be from April 1 to September 30, inclusive, and the mean monthly supply of water to be furnished under said contract shall not be in excess of the following schedule of percentages of the total annual diversion:

Month	Per Cent	Acre-feet Total of Contract
April	10	287.40
May	16	459.34
June	19	546.06
July	21	603.54
August	20	574.30
September	14	402.36
Totals	100	2,874.00

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

(d) GRANDVIEW IRRIGATION DISTRICT.--The United States shall divert into the Sunnyside Canal 14,588 acre-feet of water annually which quantity of water includes estimated losses in said Canal between the point of diversion and the point of delivery, to supply the amounts of water provided for in contracts between the United States and Grandview Irrigation District dated October 4, 1916, and February 21, 1933. The United States or its successor in the operation of the Sunnyside Canal shall deliver water pursuant to the said contracts at Mile 50.35 of the Sunnyside Canal and at Mile 2.87 of the Rocky Ford branch canal of the said Sunnyside Canal in an amount not exceeding the following monthly schedule:

Month	Acre-feet per acre
April	.36
May	.45
June	.52
July	.53
August	.53
September	.36
Total	2.75

Provided, however, that water solely from the natural flow of the Yakima

River shall be delivered by the United States during October, if desired by the District and found available by the officer in charge of the administration of the water supply for the Yakima project.

The annual irrigation season shall be from April to September, inclusive, and the maximum rate of flow at the said points of delivery which the District may demand during any one month, based on the above schedule, shall be 34 c.f.s.

There shall be delivered by the United States or its successor in the operation of the Sunnyside Canal in accordance with the contract of June 1, 1925, with the Grandview Irrigation District and the Prosser Irrigation District, to the Prosser Irrigation District for use upon the 15.21 acres of land, to which reference is made in said contract, 2.75 acre-feet of water per acre; and the amount of water to be delivered to the Grandview Irrigation District pursuant to its contract with the United States, dated August 4, 1916, shall be reduced by the proportional amount applicable to the said 15.21 acres and the amount of water to be delivered by the United States pursuant to its contract with the Prosser Irrigation District dated December 1, 1917, shall be correspondingly increased.

The United States or its successor in the operation of the Sunnyside Canal shall also deliver each year, in addition to the water supply provided for in the foregoing contract of August 4, 1915, pursuant to its contract of February 21, 1933, with the District, 1970 acre-feet of water at Mile 50.35 of the Sunnyside Canal. The annual irrigation season for the delivery of water shall be from April 1 to October 31, inclusive, and the mean monthly supply of water to be furnished under said contract shall not exceed the following schedule of percentages of the total annual diversion:

Month	Per Cent	Acre-feet Total of Contract
April	9	184
May	26	501
June	8	151
July	9	186
August	9	186
September	18	362
October	21	400
Total	100	1,970

The foregoing quantities of water for the Grandview Irrigation District shall be increased 3,000 acre-feet upon the execution of a contract for the acquisition of that quantity of water by the District and the United States as provided in paragraph 6 of this judgment. The increased quantity of water shall not, however, be diverted into the Sunnyside Canal when to do so would augment the schedule of diversions in excess of the safe carrying capacity of the Canal.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contract.

(e) ZILLAH IRRIGATION DISTRICT.--The United States shall divert into the Sunnyside Canal 362 acre-feet of water annually, which quantity of water includes estimated losses from the point of diversion to the point of delivery, to supply the amounts of water provided for in a contract dated September 29, 1922, as amended by the contract of June 22, 1931, between the United States and the Zillah Irrigation District. The United States or its successor in the operation of the Sunnyside Canal shall deliver water pursuant to the said contracts at turnouts numbered 15.47 and 15.52 and 16.82 on the Sunnyside Canal and the mean monthly supply of water shall not exceed the following schedule of percentages of the total diversion:

Month	Per Cent
April	9
May	15
June	19
July	19
August	19
September	13
October	6
Total	100

The annual irrigation season for the delivery of water shall be from April 1 to October 31, inclusive, each year.

The foregoing quantities of water for the Zillah Irrigation District shall be increased 200 acre-feet upon the execution of a contract for the acquisition of that quantity of water by the District and the United States as provided in paragraph 6 of this judgment. The increased quantity of water shall not, however, be diverted into the Sunnyside Canal when to do so would augment the schedule of diversions in excess of the safe carrying capacity of the Canal.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

(f) GRANGER IRRIGATION DISTRICT.--The United States shall divert into the Sunnyside Canal 5,454 acre-feet of water annually which quantity of water includes estimated losses from the point of diversion to the point of delivery, to supply the amounts of water provided for in a contract dated November 20, 1922, between the United States and the Granger Irrigation District. The United States or its successor in the operation of the Sunnyside Canal shall deliver water pursuant to said contract during the irrigation season from April 1 to September 30, inclusive, at the head of the pressure pipe at Mile 23 of the Sunnyside Canal, said water to be delivered to the District in amounts not to exceed the following schedule:

Month	Acre-feet per acre
April	0.40
May	0.48
June	0.56
July	0.58
August	0.58
September	0.40
Total	3.00

The maximum rate of flow which the District may demand during any one month shall be as follows:

Month	Rate of flow
April	10.9 c.f.s.
May	12.6 "
June	15.2 "
July	15.2 "
August	15.2 "
September	10.9 "

Provided, however, that water solely from the natural flow of the Yakima River shall be delivered by the United States during October, if desired by the District and found available by the officer in charge of the administration of the water supply for the Yakima project.

The foregoing quantity of water for the Granger Irrigation District shall be increased 1,800 acre-feet upon the execution of a contract for the acquisition of that quantity of water by the District and the United States as provided in paragraph 6 of this judgment. The increased quantity of water shall not, however, be diverted into the Sunnyside Canal when to do so would augment the schedule of diversions in excess of the safe carrying capacity of the Canal.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contract.

(g) OUTLOOK IRRIGATION DISTRICT.--The United States shall divert into the Sunnyside Canal 17,955 acre-feet of water annually, which quantity of water includes estimated losses from the point of diversion to the point of delivery, to supply the amount of water provided for in the contract between the United States and Outlook Irrigation District dated November 23, 1914, as amended by the contracts of August 1, 1918, and July 1, 1919, and the contract dated December 20, 1932. The United States or its successor in the operation of the Sunnyside Canal pursuant to the said contract of November 23, 1914, as amended, shall deliver 14,330 acre-feet at Mile 30.25 on the Sunnyside Canal. The annual irrigation season for the delivery of water shall be from April to September, inclusive, and the maximum rate of flow which the District may demand during any one month, based on the following schedule, shall not exceed 46 c.f.s.

and the monthly supply of water shall not exceed the following schedule of deliveries:

Month	Acre-feet Total of Contract
April	1890
May	2380
June	2730
July	2620
August	2820
September	1690
Total	14,530

Provided, however, that water solely from the natural flow of the Yakima River shall be delivered by the United States during October, if desired by the District and found available by the officer in charge of the administration of the water supply for the Yakima project.

The United States or its successor in the operation of the Sunnyside Canal, pursuant to the contract dated December 20, 1932, with the District, in addition to the water supply provided for in said contract of November 23, 1914, as amended, shall deliver annually 1185 acre-feet at the headworks of the District in the Sunnyside Canal. The annual irrigation season for the delivery of water shall be from April 1 to October 31, inclusive, and the mean monthly supply of water to be delivered under the terms of said contract shall not exceed the following schedule of percentages of the total annual diversion:

Month	Per Cent	Acre-feet Total of Contract
April	6	70
May	11	130
June	16	185
July	15	180
August	15	180
September	12	145
October	25	295
Totals	100	1,185

The foregoing quantities of water for the Cutlook Irrigation District shall be increased 4,500 acre-feet upon the execution of a contract for the acquisition of that quantity of water by the District and the United States as provided in paragraph 6 of this judgment. The increased quantity of water shall not, however, be diverted into

the Sunnyside Canal when to do so would augment the schedule of diversions in excess of the safe carrying capacity of the Canal.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

(h) SUNNYSIDE IRRIGATION DISTRICT.--The United States shall divert into the Sunnyside Canal 21,044 acre-feet of water, which quantity of water includes estimated losses between the point of diversion and the point of delivery, to supply the amounts of water provided for in a contract dated October 6, 1914, between the United States and the Sunnyside Irrigation District. The United States or its successor in the operation of the Sunnyside Canal shall deliver water pursuant to said contract to the headworks of the District, which are located on the West line of Section thirteen (13), Township nine (9) North, Range twenty-five (25) East, W.M., eleven hundred fifty-four and five-tenths (1154.5) feet North of the Southwest corner of said section, and the point at which said Canal enters said District. The annual irrigation season for the delivery of water shall be from April to September, inclusive, and the monthly supply of water shall not exceed the following schedule of deliveries:

Month	Acre-feet Total of Contract
April	2410
May	2960
June	3700
July	3690
August	3350
September	2410
Total	18,520

The maximum rate of flow which the District may demand during any one month, based on the above schedule, shall not exceed 60 c.f.s. Provided, however, that water solely from the natural flow of the Yakima River shall be delivered by the United States during October, if desired

by the District and found available by the officer in charge of the administration of the water supply for the Yakima project.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contract.

(i) Nothing in this decree shall preclude the Prosser Irrigation District, Snipes Mountain Irrigation District, Grandview Irrigation District, Zillah Irrigation District, Granger Irrigation District, Outlook Irrigation District or Sunnyside Irrigation District from the permissive use of surplus water in the Sunnyside Canal if available in the month of October, to the same extent and under the same conditions as prior to the entry of this judgment.

4. WAPATO INDIAN IRRIGATION PROJECT.--The United States shall deliver, pursuant to the Act of August 1, 1914, 38 Stat. 582, in perpetuity for lands within the Yakima Indian Reservation, hereinafter referred to as the Wapato Indian Irrigation Project, at the northern boundary thereof, a total of 720 cubic feet of water per second.

The United States shall, pursuant to the agreement dated September 21, 1943, between the Bureau of Reclamation and the Office of Indian Affairs, which superseded the agreement of March 9, 1921, as amended by an agreement dated September 3, 1936, divert from the Yakima River 250,000 acre-feet of water each year for the lands of the Wapato Indian Irrigation Project, such water to be measured at the diversion works of the Wapato Indian Irrigation Project. The irrigation season for the delivery of the 250,000 acre-feet of water shall be from April 1 to September 30, each year, except as the season may be by the United States extended to include the month of October. The diversion of the said 250,000 acre-feet of water shall be in accordance with the following basic schedule:

Month	Percent of Season Total
April	9
May	21
June	20
July	23
August	21
September	6
Total	100

The foregoing basic schedule, as provided in the agreement of September 21, 1943, may be revised for a particular irrigation season or part of a season by agreement to be entered into prior to or during the irrigation season affected, between the Project Superintendent of the Bureau of Reclamation and the Project Engineer of the Office of Indian Affairs, to permit an interchange of quantities of water available at such time as storage is being released for use below Union Gap during the months of June, July, August and September and to permit the use of part of such available quantities during the month of October. The revision in such schedule shall be effective only as to the months of June, July, August and September in the same irrigation season as the making of the agreement and only from the date of storage release.

The United States shall divert each year in addition to the water supply hereinabove set forth for the Wapato Indian Irrigation Project, in accordance with the agreement dated September 3, 1936, between the Office of Indian Affairs and the Bureau of Reclamation, and the Act of July 1, 1940, 54 Stat. 707, 100,000 acre-feet of water from the Yakima River, to be measured at the diversion works of the Wapato Indian Irrigation Project. The annual irrigation season for the delivery of such water shall be from April 1 to September 30 each year and the diversion of said 100,000 acre-feet shall be in accordance with the following basic schedule:

Month	Percent of Season Total
April	9
May	21
June	20
July	23
August	21
September	6
Total	100

The foregoing schedule, as provided in the agreement of September 3, 1936, may be revised by agreement between the Project Superintendent of the Bureau of Reclamation and the Project Engineer of the Office of Indian Affairs to permit, subsequent to the date of storage release, for use below Union Gap in the months of June, July, August and September, the use of water interchangeably during said months in an amount not to exceed 70,000 acre feet.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said agreements.

5. TIETON DIVISION (Tieton Water Users' Association and Yakima-Tieton Irrigation District).--The United States shall divert annually into the Tieton Main Canal, to supply the water rights of parties entitled to receive water from the said Canal, for use on the lands within the boundaries of the Yakima-Tieton Irrigation District, 96,000 acre-feet on the following monthly schedule:

Month	Average Rate of Delivery in Cubic Feet per Second	Delivery in Acre-feet
May	293	18,000
June	336	20,000
July	325	20,000
August	325	20,000
September	302	18,000
		96,000

The foregoing schedule of diversions shall be increased commensurate with the quantity of water to be acquired from the United States by the Yakima-Tieton Irrigation District as provided in paragraph 6 of this judgment: Provided, however, that the water acquired by that District shall not be diverted into the Tieton Main Canal when to do so would augment the schedule of diversions in excess of the safe carrying capacity of the Canal.

6. KITTITAS DIVISION (Kittitas Reclamation District).--The United States shall deliver to the Kittitas Reclamation District, pursuant to

a contract dated February 16, 1921, as amended by the contracts of November 1, 1930, and June 4, 1940, and January 10, ___, 1945, between the United States and the Kittitas Reclamation District, at a point opposite the headworks of the District constructed on the Yakima River in Section eleven (11), Township twenty (20) North, Range thirteen (13) East, W. M., during each irrigation season, 342,000 acre-feet of water measured at or near said diversion works for use upon lands within the boundaries of the District. The annual irrigation season for the delivery of water shall be from April 20 to October 15, inclusive, and the mean monthly supply of water shall not exceed the following schedule of percentages of the total annual diversion as hereinafter set forth:

During	April	2%
"	May	17%
"	June	21%
"	July	21%
"	August	20%
"	September	13%
"	October	6%

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

The Kittitas Reclamation District has released, pursuant to the foregoing contract, as amended, to the United States 20,000 acre-feet of water in the months of April, May and June, and 10,000 acre-feet of water during the months of July, August, September and October from its water supply provided for in said contract, as amended, such water to be sold by the United States to the following irrigation districts in the amounts set opposite the respective districts:

Yakima-Tieton Irrigation District	18,000	acre-feet
Granger Irrigation District	1,300	" "
Outlook Irrigation District	4,500	" "
Grandview Irrigation District	3,000	" "
Prosser Irrigation District	2,500	" "
Zillah Irrigation District	200	" "

7. ROZA DIVISION (Roza Irrigation District).--The United States shall deliver to the District, pursuant to a contract dated July 8, 1921, between the United States and the Yakima-Benton Irrigation District (now

Roza Irrigation District), as amended by the contract of April 15, 1935, at a point opposite the headworks of the District located in Section twenty-eight (28), Township fifteen (15) North, Range nineteen (19) East, W. M., 375,000 acre-feet of water measured at or near said diversion works for use upon lands within the boundaries of the District. The annual irrigation season for the delivery of water shall be from April 1 to October 31, inclusive; and the mean monthly supply of water shall not exceed the following schedule of percentages of the total annual diversion as hereinafter set forth.

During April	10%
" May	15%
" June	19%
" July	19%
" August	19%
" September	12%
" October	6%

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

8. SELAH & MOXEE IRRIGATION DISTRICT.--The predecessor in interest of the Selah & Moxee Irrigation District, in accordance with the instrument known as a limiting agreement, executed January 25, 1906, recorded March 12, 1906, in Volume 41 of Deeds at page 418 of the records of Yakima County, Washington, limited its rights in the natural flow of the Yakima River as follows:

April to August, inclusive	September	October
78 c.f.s.	60 c.f.s.	40 c.f.s.

Such rights have been recognized by the United States in a contract dated November 15, 1920, between the District and the United States.

The United States shall deliver to the District, in accordance with the foregoing contract, 3,000 acre-feet of water at a point opposite the headworks of the District on the Yakima River which headworks are located in Section seventeen (17), Township fourteen (14) North, Range nineteen (19) East, Willamette Meridian, the water to be delivered as nearly as practicable in compliance with the orders of the District.

The United States shall deliver annually to the District, pursuant to its contract dated April 30, 1931, with the District, in addition to the water supply provided for in said contract of November 15, 1920, 1757 acre-feet of water at the head of the Selah-Moxee ditch. The annual irrigation season for the delivery of water under said contract dated April 30, 1931, shall be from April 1 to September 30, inclusive, each year and the mean monthly supply of water to be delivered under said contract of April 30, 1931, shall not exceed the following schedule of percentages of the total annual diversion:

Month	Per Cent	Acre-feet Total of Contract
April	10	175.70
May	16	281.12
June	19	333.33
July	21	368.97
August	20	351.40
September	14	245.98
Totals	100	1,757.00

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts. The foregoing obligation of the United States to deliver water also is subject to an agreement dated October 27, 1939, between the Selah & Moxee Irrigation District and Terrace Heights Irrigation District, under the terms of which the Selah & Moxee Irrigation District transferred for the use of lands in the Terrace Heights Irrigation District one-tenth of the foregoing amounts. By reason thereof, the obligation of the United States to deliver the foregoing amounts is reduced by one-tenth.

9. WEST SIDE IRRIGATING COMPANY.--The West Side Irrigating Company, in accordance with the instrument which it executed October 21, 1905, known as a limiting agreement, which instrument was recorded on the 14th day of March, 1906 in Book 2 of Water Rights at page 315 of the records of Kittitas County, Washington, limited its water rights in the natural flow of the Yakima River to 80 c.f.s. during the months of April to September, inclusive, and 34 c.f.s. during the month of October of each year. These rights were recognized by the United

States in its contract of August 1, 1922, with said Company.

The United States, in accordance with the said contract of August 1, 1922, in addition, shall deliver to the Company 25 c.f.s. from April 20 to September 30, inclusive, provided that the total quantity of such water be limited to 3,200 acre-feet. The water shall be measured at a point in the canal known as the millpond wasteway and flume, located in the Southeast Quarter of the Southeast Quarter ($SE\frac{1}{4}SE\frac{1}{4}$) of Section Three (3), Township Eighteen (18) North, Range Seventeen (17) East of the Willamette Meridian.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contract.

10. UNION GAP IRRIGATION DISTRICT.--The Union Gap Irrigation Company and the Fowler Ditch Company, predecessor in interest of the Union Gap Irrigation District, to which reference is hereafter made, in accordance with the instrument which they executed on November 25, 1905, known as a limiting agreement, limited their water rights in the natural flow of the Yakima River as follows:

April to August, inclusive,	23	c.f.s.
September	16	"
October	12	"

These rights were recognized by the United States in its contract of May 23, 1906, with the Union Gap Irrigation Company.

The United States shall deliver, pursuant to the said contract of May 23, 1906, during the months from April to August, both inclusive, 28 c.f.s., during the month of September, 19 c.f.s., and during the month of October, 14 c.f.s. During the months from November to March both inclusive the United States in accordance with the contract shall deliver a reasonable amount of water for stock purposes. All water covered by the contract of May 23, 1906, shall be diverted and measured at the intake of the Fowler Ditch.

In addition, the United States shall deliver to the Union Gap Irrigation District, successor in interest of the Fowler Ditch Company, pursuant to its contract with the District dated March 2, 1915, 4222 acre-feet of water at the headworks of the District located approximately 950 feet west and 650 feet north of the southeast corner of Section seven (7), Township thirteen (13) North Range nineteen (19) East, W. M. The annual irrigation season for the delivery of water under the contract shall be from April 1 to October 31, inclusive, and the monthly supply of water furnished under said contract of March 2, 1915, shall not exceed the following schedule of deliveries:

During	April	534 acre-feet
"	May	675 " "
"	June	712 " "
"	July	737 " "
"	August	797 " "
"	September	534 " "
"	October	233 " "
		4222

The maximum flow for any one month to be 13 c.f.s.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

11. BROADWAY IRRIGATION COMPANY.--The United States shall deliver to the Broadway Irrigation Company 700 acre-feet from the natural flow water available in Wide Hollow Creek pursuant to its contract with the Company dated December 1, 1921, and shall deliver said water at a point opposite the Company's headworks located 600 feet west of the east quarter corner of Section thirty-five (35), Township thirteen (13) North, Range eighteen (18) East of the W. M. The annual irrigation season shall be from April 1 to October 31, inclusive, and the monthly supply of water shall not exceed the following schedule of percentage of the total annual diversion as hereinafter set forth:

During April	10%	-	70	acre-feet
" May	15	-	105	" "
" June	19	-	133	" "
" July	19	-	133	" "
" August	19	-	133	" "
" September	12	-	84	" "
" October	6	-	42	" "
Total			700	

The quantity of water to be delivered shall be limited to that which is available in Wide Hollow Creek.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contract.

12. CASCADE IRRIGATION DISTRICT.--The Cascade Canal Company, in accordance with an instrument known as a limiting agreement which it executed December 12, 1906, limited its rights in the natural flow of the Yakima River to 150 c.f.s. from the period from March 15, to July 20; from July 20 to October 15 such rights are limited in accordance with the storage contract referred to in the succeeding paragraph, and from October 15 to March 15 to 30 c.f.s. for stock purposes. Such rights have been recognized by the United States in a contract dated December 12, 1906, between the District and the United States. All of the rights of the Cascade Canal Company were transferred to and are now owned by the Cascade Irrigation District.

The United States shall deliver to the Irrigation District pursuant to the contract of December 12, 1906, a total of 16,800 acre-feet of water between July 20 and October 15 of each year, delivery of water to be at points higher on the river than the headgate of said District located in the Northwest Quarter (NW¼) of Section twenty-eight (28), Township nineteen (19) North, Range seventeen (17) East, W. M., and the water to be measured at a point on said canal below and within 100 feet of a certain wasteway from said canal in Section thirty-four (34), Township nineteen (19) North, Range seventeen (17) East, W. M. At no time under said contract shall the District require a flow in excess of 150 c.f.s. of time.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contract.

13. TERRACE HEIGHTS IRRIGATION DISTRICT.--The United States shall, in accordance with its contract of February 10, 1940, with the Terrace Heights Irrigation District, which supplemented the contract of March 24, 1931, deliver annually a maximum of 3,259.5 acre-feet of water per annum, measured at or near the points of diversion in the main Roza canal, the maximum net deliveries at the points of delivery, after the deduction of 10% for evaporation and seepage losses, to be made in accordance with the following monthly schedule:

Month	Total Acre-feet	Second Feet
April	416.1	6.99
May	423.6	7.67
June	501.5	8.43
July	531.2	8.64
August	521.6	8.48
September	357.7	6.01
October	121.7	1.98
Total	2,933.6	

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations of said contract.

14. MOXEE DITCH COMPANY, SUB-A.--The Moxee Company, in accordance with an instrument known as a limiting agreement which it executed October 24, 1905, limited its rights to divert water from the Yakima River as follows:

April to August inclusive	September	October
38 c.f.s.	29 c.f.s.	22 c.f.s.

The rights so limited were later divided between the Moxee Ditch Company and the Hubbard Ditch Company as follows:

Moxee Ditch Company

April to August, inclusive,	11	c.f.s.
September	8.4	"
October	6.4	"

Hubbard Ditch Company

April to August, inclusive,	27	c.f.s.
September	20.6	"
October	15.6	"

Such rights have been recognized by the United States in its contract with the Moxee Ditch Company, Sub-A, dated June 27, 1929.

The United States shall deliver annually to the Moxee Ditch Company, Sub-A, 959.4 acre-feet of water at the head of the Moxee or Hubbard Ditch in accordance with said contract of June 27, 1929. The annual irrigation season for the delivery of water shall be from April 1 to October 31, inclusive, each year and the mean monthly supply of water furnished under the contract shall not exceed the following schedule of percentages of the total annual diversion:

April	9%
May	15
June	19
July	19
August	19
September	13
October	6

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contract.

15. HACHES-SELAH IRRIGATION DISTRICT.--The predecessor in interest of the Haches-Selah Irrigation District, in accordance with the instrument executed December 21, 1905, known as a limiting agreement, limited its rights in the Yakima River during the months of April to September, inclusive, to 105 c.f.s., and 100 c.f.s. during the month of October, said limiting agreement having been recorded March 12, 1906, in Vol. 41 of Deeds, page 420, Records of Yakima County, Washington. Subsequent to execution of the limiting agreement, the predecessor in interest of the District acquired through conveyances certain additional water, and the United States by a contract dated April 8, 1920, with

the Naches-Selah Irrigation District recognized in the District the following rights or such part thereof as may be available in the natural flow of the Yakima River:

	April to August	September	October
Limiting agreement water	105 c.f.s.	105 c.f.s.	100 c.f.s.
Additional water	11.77 "	8.51 "	6.91"
Totals	116.77 "	113.51 "	106.91 "

In addition to the above mentioned water the Naches-Selah Irrigation District subsequent to the execution of said agreements purchased and acquired an additional water right of 2 c.f.s., which has been diverted through the canal of said District and used upon lands therein.

The United States shall deliver annually to the District in accordance with its contract of April 6, 1920, from April 1 to August 31, inclusive, a supply of "supplemental water" to be delivered in amounts not to exceed the following schedule of deliveries:

During April	674	acre-feet
" May	811	" "
" June	901	" "
" July	1050	" "
" August	1050	" "
Total	4486	" "

The maximum rate of flow for such supplemental water shall not exceed 17.1 c.f.s. and shall be delivered at a point opposite the headworks of the District on the Naches River in the Southwest Quarter (SW¼), Northwest Quarter (NW¼), Section thirty-five (35), Township fifteen (15) North, Range sixteen (16) East, W. M.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

16. YAKIMA VALLEY CANAL COMPANY.--The Yakima Valley Canal Company, in accordance with the instrument which it executed January 3, 1906, known as a limiting agreement, which was recorded March 12, 1906, in Vol. 41 of Deeds at page 397, Yakima County, Washington, limited its

water rights to 62½ c.f.s. during the months of April to August, inclusive, 40 c.f.s. during the month of September, and 30 c.f.s. during the month of October of each year. Subsequent to the limiting agreement the Company acquired certain additional water rights, purported to be 1½ c.f.s., by a conveyance recorded in Vol. 146 of Deeds, page 566 of the Yakima County records.

The United States by its contract with the Yakima Valley Canal Company, dated June 2, 1920, recognized in the Company the following rights or such part thereof as may be available from the natural flow of the Yakima River:

	April to August (both inclusive)	September	October
Limiting agreement water	62.5 c.f.s.	40 c.f.s.	30 c.f.s.
Transferred water	1.5 "	1.5 "	0.75 "
	64 c.f.s.	41.5 c.f.s.	30.75 c.f.s.

The United States shall deliver to the Company each year, in accordance with the contract of June 2, 1920, 4300 acre-feet of storage water. Delivery of such water shall be made at a point opposite the headworks of the Company on the Naches River in the Northwest Quarter (NW¼) of Section twenty-five (25), Township fourteen (14) North, Range seventeen (17) East, W. M.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations of said contracts.

17. The United States shall continue to divert available flood water from the Yakima River and its tributaries in accordance with its practice prior to the entry of this judgment, and the quantities of such water which the parties to this judgment are entitled to receive shall be over and above the schedules of diversion hereinabove set forth. Within the meaning of this judgment, flood water is available for such diversions when, as determined by the Yakima Project Superintendent, there is flowing over the Sunnyside dam flood water in excess of the amount he deems necessary for proper river regulation, including in said amount

the amount necessary to protect fish life in the river below said dam. The determinations by the Yakima Project Superintendent as to whether flood water is available for such diversions shall be binding upon the parties hereto, subject to review by the court. The United States, or its successor in the operation of the Sunnyside Canal, shall deliver at the points of delivery in said canal, as above set forth, the pro rata shares of the Sunnyside Valley, Prosser, Snipes Mountain, Grandview, Zillah, Granger, Outlook and Sunnyside Irrigation Districts of said flood waters.

18. The parties to this judgment, except as provided in paragraph 19 hereof, shall have equal rights with respect to the priority in the delivery of the quantities of water to which they are entitled under the preceding paragraphs of this judgment. If for any cause it is impossible to supply fully those quantities, the water subject to proration to which each party to this judgment is entitled shall be proportionately diminished. The pro rata share of that water which each of the parties to this judgment shall receive during a period of insufficient supply shall be an amount in the same proportion to the quantity of water subject to proration that each of the parties is entitled to under this judgment as the total water supply available, as hereinafter defined, less the summation of the rights recognized in paragraph 19 bears to the aggregate of the following quantities of water: Those quantities of water provided for in this judgment which are subject to proration, and those quantities subject to proration which the United States has contracted to deliver to water users not parties to this judgment; provided, however, that during the period of development of the Roza Division the amount of water to be included for that Division in the foregoing aggregate shall be the amount diverted for the irrigated lands of that Division in a normal year, plus estimated losses from the point of diversion to the place of delivery, rather than the

amount recognized in paragraph 7 of this judgment; and provided further that, during the period of development of the Roza Division, in computing the pro rata share of water which the Roza Division will be entitled to receive in a period of insufficient supply there will be used that quantity of water diverted for the Roza Division in a normal year plus estimated losses, rather than the quantity recognized for that Division in paragraph 7 of this judgment.

For the purpose of this judgment "total water supply available" is defined as that amount of water available in any year from natural flow of the Yakima River, and its tributaries, from storage in the various Government reservoirs on the Yakima watershed and from other sources, to supply the contract obligations of the United States to deliver water and to supply claimed rights to the use of water on the Yakima River, and its tributaries, heretofore recognized by the United States.

19. The following amounts of water are excepted from the preceding paragraph with respect to proration, and the summation of said amounts shall be deducted from the "total water supply available" subject to proration:

(1) 720 c.f.s. of water for the use on lands within the Wapato Indian Irrigation Project provided for by the Act of August 1, 1914 (38 Stat. 604), which amount shall constitute the limit of the water rights of the said Project not subject to proration.

(2) 250 c.f.s. of water during the months of May, June, July, August, and September of the amount heretofore recognized in this judgment for the use on lands within the Tieton Division, which amount shall constitute the limit of the water rights of said Division not subject to proration.

(3) 700 c.f.s. of water during the months of April, May, June, July, August, September, and the first 20 days of October, of the amount heretofore recognized in this judgment for the use on lands within the Sunnyside Valley Irrigation District, which amount shall constitute the limit of the water rights of said District not subject to proration, except as to those lands within the Sunnyside Valley Irrigation District which are covered by sub-paragraph 5 hereof. Provided, however, that not exceeding 50 c.f.s. of said amount may be measured daily by the Bureau of Reclamation from return flow of the Roza Division into the Sunnyside Canal. The amounts so excepted from proration shall be for the benefit of all lands within the Sunnyside Valley Irrigation District, subject to classification of lands by the Board of Directors of the District.

(4) 35 c.f.s. of water for the use on the so-called Konnewock lands, served from the Sunnyside Canal, which amount shall constitute the limit of the water rights for said lands not subject to proration.

(5) 26 c.f.s. of water, for the use on Piety Flat lands, in accordance with the contract of May 1, 1914, between the United States and Piety Flat Ditch Company, served from the Sunnyside Canal, which amount shall constitute the limit of the water rights for said lands not subject to proration.

(6) 23 c.f.s. of water, in accordance with the contract of September 24, 1910, between the United States and Prosser Falls Land and Power Company, served from Sunnyside Canal, which is the limit of this right not subject to proration.

(7) 5 c.f.s. of water, in accordance with the contract between the United States and the Town of Prosser, dated May 3, 1911, served from the Sunnyside Canal, which is the limit of this right not subject to proration.

In addition to the amounts herein set forth which shall be excepted from paragraph 18 with respect to proration, there also shall be excepted from paragraph 18 the rights of Cascade Irrigation District which are recognized in paragraph 12, and the amounts claimed by other water users of natural flow rights from the Yakima River and its tributaries, which have heretofore been recognized by the United States whether or not such users are parties to this action, and the summation of said amounts shall also be deducted from the total water supply available subject to proration. Exception from proration of such amounts specified in the preceding sentence from the total water supply available does not constitute a determination of the quantum or priority of such claimed rights, and is without prejudice to any of the parties to this action.

20. This judgment shall constitute a final determination of the obligation of the United States to deliver water from the Yakima River, and its tributaries, from storage from its various reservoirs in the Yakima watershed and from other sources to the parties to this judgment and the lands within the Wapato Indian Irrigation Project. Each of the parties to this cause, their grantees, successors and assigns are by this judgment forever enjoined and restrained from asserting any claim to or from interfering with any of the rights to the use or the delivery of those quantities of water which are recognized in this judgment. This judgment shall not, however, be construed as limiting or in any way interfering with the transfer or legal succession of any of those rights. The rights of any ~~adverse~~ claimants to water of the Yakima River or watershed who are not parties to this cause shall

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in no way be prejudiced or affected by this judgment nor will it in any way prejudice or affect the rights of the parties to this judgment as they may pertain to the rights of such claimants. This judgment shall be binding upon and inure to the benefit of the grantees, assigns or successors of the parties hereto. The several parties to this suit shall pay their own costs in this action.

The Court, in its discretion, may appoint a watermaster, who shall be vested with such authority as the Court deems appropriate in the administration of the water rights, subject to the provisions of this judgment. This Court shall retain jurisdiction over matters of interpretation of this judgment and matters relating to the administration thereof.

Done in open court this 31 day of January, 1945.

JUDGE

85-255

Supreme Court, U.S.
FILED
JUL 18 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE SUPREME COURT
OF THE UNITED STATES

SUNNYSIDE VALLEY IRRIGATION DISTRICT,

Petitioner,

vs.

UNITED STATES OF AMERICA, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KITTITAS RECLAMATION DISTRICT,	)	
Plaintiffs-Appellees,	)	NOS. 80-3505
	)	81-3002
vs.	)	81-3068
	)	81-3069
SUNNYSIDE VALLEY IRRIGATION DISTRICT, et al.,	)	DC# Civil No. 21
Defendants-Appellants.	)	A M E N D E D
	)	O P I N I O N

Appeal from the United States District Court
for the Eastern District of Washington
District Judge Justin L. Quackenbush,
Presiding

(Argued and Submitted July 8, 1982 - Seattle)
Decided February 6, 1985;
Amended June 14, 1985

Before: KILKENNY, WRIGHT, and CANBY,
Circuit Judges.

WRIGHT, Circuit Judge:

The opinion filed on September 10, 1982, is withdrawn and replaced by this opinion. The 1982 opinion was withheld from

publication during our consideration of the petitions for rehearing.

The petitions for rehearing by Sunnyside Valley Irrigation District (Sunnyside), Union Gap Irrigation District (Union Gap), and Yakima Valley Canal Company (Yakima Valley), supported by amicus curiae briefs of the State of Washington, are denied. The petitions for rehearing by Sunnyside, Union Gap, Yakima Valley, and Yakima-Tieton irrigation District filed after our February 6, 1985 opinion are also denied.

In the fall of 1980, the district court ordered water released from a Yakima water project reservoir to preserve redds (nests of salmon eggs) threatened by low post-irrigation season water flows. We must decide whether the district court had authority to order the water released.

This appeal involves the collision of two interests: the Yakima Nation's interest in preservation of their fishing rights, and the eastern Washington farmers' interest in preservation of water needed for crops in the dry spring and summer. Irrigation districts in eastern Washington protest the district court's interference with their interests.

The Yakima Nation's interest dates back to its 1855 treaty with the United States. Article III reserved to the Indians "[t]he exclusive right of taking fish in all the streams . . . bordering [the] reservation . . . also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory . . . ." 12 Stat. 951, 953 (1855).

The farmers' interest stems from the irrigation and storage systems constructed by

the Reclamation Service in 1909 to 1933, and a 1945 consent decree, which specified the amounts of water to be delivered to the appellant irrigation districts during the irrigation season. The district court retained jurisdiction over the consent decree's interpretation and administration. It entered the orders on appeal under this jurisdiction.

The Chinook salmon normally spawn in the fall when the water in a river is near its lowest levels. This practice ensures that in a natural river system, the spawning site will remain covered with water throughout the year. But artificially high irrigation releases in the early fall of 1980 caused the salmon to misjudge. If officials closed the Cle Elum dam as usual, to begin winter

storage, approximately 60 redds would have been exposed and destroyed.

When the Yakima Nation discovered this, it requested the irrigation system's court-appointed watermaster to maintain the water flow. The watermaster, in turn, asked the district court for instructions.

The court held two hearings. At the first, in October 1980, it concluded that the 1945 consent decree did not consider the Yakima Nation's treaty fishing right. Thus, the decree did not limit or preclude measures necessary to preserve that right when operation of the irrigation system threatened to damage the salmon run. Because of the immediacy of the problem, the court ordered release of necessary water until the next hearing, held in November 1980.

After the November hearing, the court issued additional instructions to the watermaster regarding the 1980 to 1981 non-irrigation season. These authorized (1) continued release of water, as necessary, to preserve the redds; (2) use of alternative measures to preserve the redds, such as diversionary berms and transplantation; and (3) monitoring of the redds' condition. The court also ordered a study of methods for subsequent irrigation seasons (including regulation of reservoir releases during the spawning season) that would accomodate the needs of farmers and, at the same time, preserve the salmon run.

The irrigation districts argue that the court lacked jurisdiction because its order exceeded the scope of authority reserved in the consent decree. Alternatively, they

argue that a pending state court adjudication of Yakima basin water rights deprived the court of jurisdiction.

Substantively, the irrigation districts argue that any water right associated with the Indians' fishing right was abrogated by Congress before the consent decree, or in its settlement. They claim also that the decree is res judicata of any water right.

ANALYSIS

The district court did not exceed the scope of its retained jurisdiction under the

consent decree.[1/] Paragraph 20 gave the court jurisdiction "over matters of interpretation of this judgment and matters relating to the administration thereof."

[1/] Although neither side argues that mootness or lack of finality bar our jurisdiction, we must examine this issue on our own initiative. Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152, 29 S.Ct. 42, 43, 53 L.Ed. 126 (1908); Willis v. Craig, 555 F.2d 724, 726 (9th Cir. 1977).

We find no lack of finality because we have reviewed similar orders issued by the district court pursuant to its continuing jurisdiction over the consent decree. See Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 626 F.2d 95 (9th Cir. 1980), cert. denied, 449 U.S. 1079, 101 S.Ct. 861, 66 L.Ed.2d 802 (1981). Nor is this case moot because the challenged orders could not be fully litigated prior to the end of their effective period and the situation may arise again. Weinstein v. Bradford, 423 U.S. 147, 149, 96 S.Ct. 347, 348-49, 46 L.Ed.2d 350 (1975) (per curiam).

Appellants argue that this clause limits the court's jurisdiction to disputes between the parties to the decree.

No such limitation appears. The decree specifically stated that it did not adjudicate the rights of persons not made parties, including the Yakima Nation.[2/] The Court properly assumed jurisdiction to interpret the decree in light of the Nation's treaty fishing right.

2/ Paragraph 20 of the consent decree reads in part: "The rights of any claimants to water of the Yakima River or watershed who are not parties to this case shall in no way be prejudiced or affected by this judgment . . . ."

Nor was the district court required to dismiss the proceeding in favor of a state court action generally adjudicating water rights in the Yakima River Basin, State of Washington v. Acquavella, No. 77-2-01484-5 (Yakima Co. Super. Ct., filed Oct. 12, 1977). Appellants' reliance on Colorado River Water Conservation District v. United States (Akin), 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), is misplaced.

Akin does not hold that a pending state action adjudicating water rights automatically deprives the district court of jurisdiction over issues implicating water. Rather, the Akin Court found only that, based on consideration of several factors,[3/] dismissal of the federal suit in favor of state proceedings was justified by wise judicial administration and efficiency.

Those factors are not present here. In Akin, the parties intended both the federal and state court proceedings to be general adjudications of all water rights in the

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3/ The factors weighing in favor of dismissal in Akin were: (1) that the McCarran Amendment evinced a clear federal policy in favor of general, unified water rights adjudication; (2) that the state had a comprehensive system for adjudicating and managing water rights; (3) that the United States had filed only its complaint in federal court before the defendants moved to dismiss in favor of the state proceeding; (4) that over 1,000 defendants were named, indicating extensive involvement of state water rights; (5) that the federal court was located farther from the area in question; and (6) that in other state water divisions, the United States had voluntarily participated in ongoing state water adjudication.

area. The United States had filed only the complaint when the defendants moved to dismiss it in favor of the state proceeding. Here, the district court interpreted a decree entered by it in 1945. The parties intended no general adjudication of water rights and no party moved to dismiss the federal suit.

We do not find that the district court acted inconsistently in denying removal of the Acquavella action based on the Akin factors while retaining jurisdiction here. As noted above, the two actions have little in common.

Because the 1945 consent decree was not a general adjudication of all water rights in the Yakima River Basin and did not adjudicate

the treaty rights of the Yakima Nation,[4/] appellants' res judicata argument also fails.

In October 1980, the watermaster and other parties presented the district court with an emergency. The scheduled closing of the dam threatened the redds with destruction. Information on alternative means of preserving the redds was noticeably absent. The court granted the Department of the Interior more time to study the problem and temporarily ordered the water levels

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4/ The 1945 decree resulted from a suit filed by the United States in 1939, seeking a declaration of their responsibilities to various contract holders in the Yakima Irrigation System. Neither side joined the additional parties that would have been necessary for a general adjudication, like the one involved in Nevada v. United States, 463 U.S. 110, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983). The final decree settled only the rights of the irrigation districts made party to the proceeding.

maintained in sufficient amount to preserve the redds.

At the second hearing, experts in the field of fish biology testified and suggested actions for preserving the redds other than release of water. One suggested that if 12 of the redds were transplanted, the dam could be closed. The judge ordered these measures taken, including transportation of the endangered redds, construction of berms to divert water into secondary channels, and the opening of some of those channels. Because he was unsure of the effect of these measures, he continued the watermaster's authority to release water as necessary.

We find no abuse of discretion in the court's decision. It was empowered to issue orders directing the allocation of water within the Yakima River system. Its orders

authorizing the watermaster to preserve the 1980 redds were reasonable emergency measures.

The order for further study of the problem was reasonable under the circumstances. The study would provide data necessary to insure future disputes could be resolved in the most efficient way.

We affirm the district court's orders.[5/]

5/ We need not decide the scope of fishing rights reserved to the Yakima Nation under the 1855 treaty.

UNITED STATES COURT OF APPEALS
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KITTITAS RECLAMATION DISTRICT,	)	Nos. 80-3505
	)	81-3002
Plaintiffs-Appellees,	)	81-3068
	)	81-3069
vs.	)	
	)	DC# Civil No. 21
SUNNYSIDE VALLEY IRRIGATION DISTRICT, et al.,	)	O P I N I O N
	)	
Defendants-Appellants.	)	
	)	

Appeal from the United States District Court for the Eastern District of Washington
District Judge Justin L. Quackenbush, Presiding
Decided February 6, 1985
[Argued and Submitted July 8, 1982]

Before: KILKENNY, WRIGHT, and CANBY, Circuit Judges.

WRIGHT, Circuit Judge:

The opinion filed on September 10, 1982, is withdrawn and replaced by this opinion. The 1982 opinion was withheld from

publication during our consideration of the petitions for rehearing.

The petitions for rehearing by Sunnyside Valley Irrigation District, Union Gap Irrigation District, and Yakima Valley Canal Company, supported by amicus curiae briefs of the State of Washington, are denied.

In the fall of 1980, the district court ordered water released from a Yakima water project reservoir to preserve redds (nests of salmon eggs) threatened by low post-irrigation season water flows. We must decide whether the district court had authority to order the water released.

This appeal involves the collision of two interests: the Yakima Nation's interest in preservation of their fishing rights, and the eastern Washington farmers' interest in preservation of water needed for crops in the

dry spring and summer. Irrigation districts in eastern Washington protest the district court's interference with their interests.

The Yakima Nation's interest dates back to its 1855 treaty with the United States. Article III preserved to the Indians "[t]he exclusive right of taking fish in all the streams . . . bordering [the] reservation . . . also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory . . . . " 12 Stat. 951, 953 (1855).

The farmers' interest stems from the irrigation and storage systems constructed by the Reclamation Service in 1909 to 1933, and a 1945 consent decree, which specified the amounts of water to be delivered to the appellant irrigation districts during the irrigation season. The district court

retained jurisdiction over the consent decree's interpretation and administration. It entered the orders on appeal under this juridiction.

The Chinook salmon normally spawn in the fall when the water in a river is near its lowest levels. This practice ensures that in a natural river system, the spawning site will remain covered with water throughout the year. But artificially high irrigation releases in the early fall of 1980 caused the salmon to misjudge. If officials closed the Cle Elum dam as usual, to begin winter storage, approximately 60 redds would have been exposed and destroyed.

When the Yakima Nation discovered this, it requested the irrigation system's court-appointed watermaster to maintain the

water flow. The watermaster, in turn, asked the district court for instructions.

The court held two hearings. At the first, in October 1980, it concluded that the 1945 consent decree did not consider the Yakima Nation's treaty fishing right. Thus, the decree did not limit or preclude measures necessary to preserve that right when operation of the irrigation system threatened to damage the salmon run. Because of the immediacy of the problem, the court ordered release of necessary water until the next hearing, held in November 1980.

After the November hearing, the court issued additional instructions to the watermaster regarding the 1980 to 1981 non-irrigation season. These authorized (1) continued release of water, as necessary, to preserve the redds; (2) use of alternative

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The irrigation districts argue that the court lacked jurisdiction because its order exceeded the scope of authority reserved in the consent decree. Alternatively, they argue that a pending state court adjudication of Yakima basin water rights deprived the court of jurisdiction.

Substantively, the irrigation districts argue that any water right associated with the Indians' fishing right was abrogated by

Congress before the consent decree, or in its settlement. They claim also that the decree is res judicata of any water right.

JURISDICTION[1/]

1/ Although neither side argues that mootness or lack of finality bar our jurisdiction, we must examine this issue on our own initiative. Louisville & Nashville R.R. v. Motley, 211 U.S. 149, 152, 29 S.Ct. 42, 43, 53 L.Ed. 126 (1908); Willis vs. Craig, 555 F.2d 724, 726 (9th Cir. 1977).

We find no lack of finality because we have reviewed similar orders issued by the district court pursuant to its continuing jurisdiction over the consent decree. See Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 626 F.2d 95 (9th Cir. 1980), cert. denied, 449 U.S. 1079, 101 S.Ct. 861, 66 L.Ed.2d 802 (1981). Nor is this case moot because the challenged orders could not be fully litigated prior to the end of their effective period and the situation may arise again. Weinstein v. Bradford, 423 U.S. 147, 149, 96 S.Ct. 347, 348-49, 46 L.Ed.2d 350 (1975) (per curiam).

The district court did not exceed the scope of its retained jurisdiction under the consent decree. Paragraph 20 gave the court jurisdiction "over matters of interpretation of this judgment and matters relating to the administration thereof." Appellants argue that this clause limits the court's jurisdiction to disputes between the parties to the decree.

No such limitation appears. The decree specifically stated that it did not adjudicate the rights of persons not made parties, including the Yakima Nation.[2/] The

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2/ Paragraph 20 of the consent decree reads in part: "The rights of any claimants to water of the Yakima River or watershed who are not parties to this case shall in no way be prejudiced or affected by this Judgment.

court properly assumed jurisdiction to interpret the decree in light of the Nation's treaty fishing right.

Nor was the district court required to dismiss the proceeding in favor of a state court action generally adjudcating water rights in the Yakima River basin, State of Washington v. Acquavella, No. 77-2-01484-5 (Yakima Co. Super. Ct., filed Oct. 12, 1977). Appellants' reliance on Colorado River Water Conservation District v. United States (Akin), 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), is misplaced.

Akin does not hold that a pending state action adjudicating water rights automatically deprives the district court of jurisdiction over issues implicating water. Rather, the Akin Court found only that, based

on consideration of several factors,[3/] dismissal of the federal suit in favor of state proceedings was justified by wise judicial administration and efficiency.

3/ The factors weighing in favor of dismissal in Akin were: (1) that the McCarran Amendment evinced a clear federal policy in favor of general, unified water rights adjudication; (2) that the state had a comprehensive system for adjudicating and managing water rights; (3) that the United States had filed only its complaint in federal court before the defendants moved to dismiss in favor of the state proceeding; (4) that over 1,000 defendants were named, indicating extensive involvement of state water rights; (5) that the federal court was located further from the area in question; and (6) that in other state water divisions, the United States had voluntarily participated in ongoing state water adjudication.

Those factors are not present here. In Akin, the parties intended both the federal and state court proceedings to be general adjudications of all water rights in the area. The United States had filed only the complaint when the defendants moved to dismiss it in favor of the state proceeding. Here, the district court interpreted a decree entered by it in 1945. The parties intended no general adjudication of water rights and no party moved to dismiss the federal suit.

We do not find that the district court acted inconsistently in denying removal of the Acquavella action based on the Akin factors while retaining jurisdiction here. As noted above, the two actions have little in common.

SUBSTANTIVE BASIS OF THE ORDERS

The 1855 Treaty reserved to the Yakima Nation extensive fishing rights. See Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 666-667, 99 S.Ct. 3055, 3064-65, 61 L.Ed.2d 823 (1979) (Yakima treaty secured right to fish at numerous accustomed places, both on and off the reservation), United States v. Winans, 198 U.S. 371, 381, 25 S.Ct. 662, 664, 49 L.Ed. 1089 (1905) (Yakima Nation Indians entitled to cross land settled by non-Indians to reach accustomed fishing grounds). The Treaty protects the Nation against restriction of or interference with their reserved rights. United States v. State of Washington, 506 F.Supp. 187, 203 (W.D. Wash. 1980).

The parties to a treaty bear a duty to refrain from actions interfering with either

the Indians' access to fishing grounds or the amount of fish present there. Id. The government constructed the irrigation project subject to that duty. When its operation of the project threatened further to deplete an already low Chinook salmon run, see United States v. Oregon, 657 F.2d 1009 (9th Cir. 1981), it violated its duties under the Treaty.

In the fall of 1980 the regulation of the river water levels interfered with the salmon spawning habits. This violation authorized the district court to correct or offset the damage unless, as appellants argue, the consent decree or prior Congressional action abrogated the Yakima Nation's Treaty fishing right.

Congress may abrogate rights reserved by the Indians, but we do not lightly impute

such an intent. Menominee Tribe of Indians v. United States, 391 U.S. 404, 413, 88 S.Ct. 1705, 1711, 20 L.Ed.2d 697 (1968). We find no evidence that Congress abrogated or limited the Treaty fishing right.

Appellants point to 1906 administrative action limiting the Indian Irrigation Project (now the Wapato Irrigation Project) to 147 c.f.s. of water for irrigation purposes, and Congressional action in 1914, which raised this amount to 720 c.f.s. Indian Appropriation Act of 1914, ch. 222, 38 Stat. 582, 604. Later contracts between the Bureau of Reclamation and the Project increased the Indians' irrigation water allocation.

The Wapato Irrigation Project was a party to the 1945 consent decree which allocated to the Indians 720 c.f.s. without proration, and the additional contract

amounts, subject to proration. The United States was also a party to that decree.

Neither the Wapato Irrigation Project nor the United States represented the Indians for purposes of their fishing water rights. Fishing rights were not a subject of the 1945 dispute. No abrogation or limitation of fishing rights occurred when the irrigation rights were determined.

Because the 1945 consent decree was not a general adjudication of all water rights in the Yakima River Basin,[4/] appellants' res judicata argument also fails.

In October 1980, the watermaster and other parties presented the district court with an emergency. The scheduled closing of the dam threatened the redds with destruction. Information on alternative means of preserving the redds was noticeably absent.

The court granted the Department of the Interior more time to study the problem and temporarily ordered the water levels maintained in sufficient amount to preserve the redds.

4/ The 1945 decree resulted from a suit filed by the United States in 1939, seeking a declaration of their responsibilities to various contract holders in the Yakima Irrigation System. Neither side joined the additional parties that would have been necessary for a general adjudication, like the one involved in Nevada v. United States, 103 S.Ct. 2906 (1983). The final decree settled only the rights of the irrigation districts made party to the proceeding.

At the second hearing, experts in the field of fish biology testified and suggested actions for preserving the redds other than release of water. One suggested that if 12 of the redds were transplanted, the dam could be closed. The judge ordered these measures taken, including transportation of the endangered redds, construction of berms to divert water into secondary channels, and the opening of some of those channels. Because he was unsure of the effect of these measures, he continued the watermaster's authority to release water as necessary.

We find no abuse of discretion in the court's decision. It had authority to interpret the 1945 consent decree in light of the Treaty fishing right. Its orders authorizing the watermaster to preserve the

1980 redds were reasonable emergency measures taken to protect the Treaty fishing right.

We need not decide the exact scope of the Treaty fishing right. It is enough to note that the Indians' fishing rights are protected and under these circumstances the release of water was justified to avoid damage to the redds.

The order for further study of the problem was a reasonable measure. The study would provide data necessary to insure future disputes could be resolved in the most reasonable and workable way.

We affirm the district court's orders.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KITTITAS RECLAMATION DISTRICT, UNITED STATES, et al.,	)	Nos. 80-3505, 81-3002, 81-3068, 81-3069
Plaintiffs-Appellees,	)	
vs.	)	
SUNNYSIDE VALLEY IRRIGATION DISTRICT, et al.,	)	DC# Civil No. 21
Defendants-Appellants.	)	OPINION

Appeal from the United States District Court for the Eastern District of Washington
District Judge Justin L. Quackenbush, Presiding

[Argued and Submitted July 8, 1982]

Before: WRIGHT, KILKENNY, and CANBY, Circuit Judges.

WRIGHT, Circuit Judge:

In the fall of 1980, the district court ordered water released from a Yakima water project reservoir to preserve redds (nests of

salmon eggs) threatened by low post-irrigation season water flows. We must decide whether the district court had authority to order the water released.

This appeal involves the collision of two interests: the Yakima Nation's interest in preservation of their fishing rights, and the eastern Washington farmers' interest in preservation of water needed for crops in the dry spring and summer. Irrigation districts in eastern Washington protest the district court's interference with their interests.

The Yakima Nations' interest dates back to its 1855 treaty with the United States. Article III reserved to the Indians "[t]he exclusive right of taking fish in all the streams . . . bordering the reservation . . . also the right of taking fish at all usual and accustomed places, in common with

citizens of the Territory . . . . " 12 Stat. 25, 27 (1859).

The farmers' interest stems from the irrigation and storage systems constructed by the Reclamation Service in 1909 to 1933, and a 1945 consent decree, which specified the amounts of water to be delivered to tne appellant irrigation districts during the irrigation season. The district court retained jurisdiction over the consent decree's interpretation and administration. It entered the orders on appeal under this jurisdiction.

The Chinook salmon normally spawn in the fall when the water in a river is near its lowest levels. This practice ensures that in a natural river system, the spawning site will remain covered with water throughout the year. But artificially high irrigation

releases in the early fall of 1980 caused the salmon to misjudge. If officials closed the Cle Elum dam as usual, to begin winter storage, approximately 60 redds would have been exposed and destroyed.

When the Yakima Nation discovered this, it requested the irrigation system's court-appointed watermaster to maintain the water flow. The watermaster, in turn, asked the district court for instructions.

The court held two hearings. At the first, in October 1980, it concluded that the 1945 consent decree did not consider the Yakima Nations' treaty fishing right. Thus, the decree did not limit or preclude measures necessary to preserve that right when operation of the irrigation system threatened to damage the salmon run. Because of the immediacy of the problem, the court ordered

release of necessary water until the next hearing, held in November 1980.

After the November hearing, the court issued additional instructions to the watermaster. These authorized (1) continued release of water, as necessary, to preserve the redds; (2) use of alternative measures to preserve the redds, such as diversionary berms and transplantation; (3) monitoring of the redds' condition; and (4) study of methods for subsequent irrigation seasons (including regulation of reservoir releases during the spawning season) that would accommodate the needs of farmers and, at the same time, preserve the salmon run.

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Substantively, the irrigation districts argue that any water right associated with the Indians' fishing right was abrogated by Congress before the consent decree, or in its settlement. They claim also that the decree is res judicata of any water right.

Jurisdiction [1/]

The district court did not exceed the scope of its retained jurisdiction under the consent decree. Paragraph 20 gave the court jurisdiction "over matters of interpretation of this judgment and matters relating to the administration thereof." Appellants argue that this clause limits the court's jurisdiction to disputes between the parties to the decree.

No such limitation appears. The decree specifically stated that it did not adjudicate the rights of persons not made parties, including the Yakima Nation.[2/] The court properly assumed jurisdiction to interpret the decree in light of the Nations' treaty fishing right.

Nor was the district court required to dismiss the proceeding in favor of a state court action generally adjudicating water rights in the Yakima River basin, State of Washington v. Acquavella, No. 77-2-01484-5 (Yakima Co. Super. Ct., filed Oct. 12, 1977).[3/] Appellants' reliance on Colorado River Water Conservation District vs. United States, (Akin), 424 U.S. 800 (1976), is misplaced.

Akin does not hold that a pending state action adjudicating water rights

automatically deprives the district court of jurisdiction over issues implicating water. Rather, the Akin Court found only that, based on consideration of several factors,[4/] dismissal of the federal suit in favor of state proceedings was justified by wise judicial administration and efficiency.

Those factors are not present here. In Akin, the parties intended both the federal and state court proceedings to be general adjudications of all water rights in the area. The United States had filed only the complaint when the defendants moved to dismiss it in favor of the state proceeding. Here, the district court interpreted a decree entered by it in 1945. The parties intended no general adjudication of water rights and no party moved to dismiss the federal suit.

We do not find that the district court acted inconsistently in denying removal of the Acquavella action based on the Akin factors while retaining jurisdiction here. As noted above, the two actions have little in common.

Substantive Basis of the Orders

The 1855 Treaty reserved to the Yakima Nation extensive fishing rights. See Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658, 666-667 (1979) (Yakima treaty secured right to fish at numerous accustomed places, both on and off the reservation), United States vs. Winans, 198 U.S. 371, 381 (1905) (Yakima Nation Indians entitled to cross land settled by non-Indians to reach accustomed fishing grounds). The Treaty protects the Nation against restriction of or

interference with their reserved rights. United States v. State of Washington, 506 F.Supp. 187, 203 (W.D. Wash. 1980).

The parties to a treaty bear a duty to refrain from actions interfering with either the Indians' access to fishing grounds or the amount of fish present there. Id. The government constructed the irrigation project subject to that duty. When its operation of the project threatened further to deplete an already low Chinook salmon run, see United States v. State of Oregon, 657 F.2d 1009 (9th Cir. 1981), it violated its duties under the Treaty.

In the fall of 1980, the regulation of the river water levels interfered with the salmon spawning habits. This violation authorized the district court to correct or offset the damage unless, as appellants

argue, the consent decree or prior Congressional action abrogated the Yakima Nations' Treaty fishing right.

Congress may abrogate rights reserved by the Indians, but we do not lightly impute such an intent. Menominee Tribe of Indians v. United States, 391 U.S. 404, 413 (1968). We find no evidence that Congress abrogated or limited the Treaty fishing right.

Appellants point to 1906 administrative action limiting the Indian Irrigation Project (now the Wapato Irrigation Project) to 147 c.f.s. of water for irrigation purposes, and Congressional action in 1914, which raised this amount to 720 c.f.s. Indian Appropriation Act of 1914, ch.222, 38 Stat. 582, 604. Later contracts between the Bureau of Reclamation and the Project increased the Indians' irrigation water allocation.

The Wapato Irrigation Project was a party to the 1945 consent decree which allocted to the Indians 720 c.f.s. without proration, and the additional contract amounts, subject to proration.

We fail to see how determination of the Yakima Nations' entitlement to water for irrigation abrogated or limited their fishing right. Part of the confusion arises from appellants' mischaracterization of the district court's action as recognition of an implied reserved water right.[5/] We do not affirm the district court's orders on the basis of whatever water rights may be reserved to the Yakima Nation to fulfill vital purposes of its Treaty. We base our holding solely on the Nations' Treaty fishing right.

This clarification eliminates appellants' res judicata argument as well. Appellants rely on United States v. Truckee-Carson Irrigation District, 649 F.2d 1286, 666 F.2d 351 (9th Cir. 1981). In Truckee we held that a 1944 general federal water adjudication barred a 1973 action seeking a declaration of a reserved water right in the Paiute Indians for preservation of their fishery in Pyramid Lake and the Lower Truckee River. Not only is no reserved water right implicated in this case, but the 1945 consent decree was not a general adjudication of all water rights in the Yakima River Basin.[6/]

Propriety of the Corrective Measures Chosen

In October 1980, the watermaster and other parties presented the district court with an emergency. The scheduled closing of

the dam threatened the redds with destruction. Information on alternative means of preserving the redds was noticeably absent. The court granted the Department of the Interior more time to study the problem and temporarily ordered the water levels maintained in sufficient amount to preserve the redds.

At the second hearing, experts in the field of fish biology testified and suggested actions for preserving the redds other than release of water. One suggested that if 12 of the redds were transplanted, the dam could be closed. The court ordered these measures taken, including transplantation of the endangered redds, construction of berms to divert water into secondary channels, and the opening of some of those channels. Because he was unsure of the effect of these

measures, he continued the watermaster's authority to release water as necessary.

We find no abuse of discretion in the court's decision. It properly weighed the interests involved[7/] and the emergency nature of the problem. Given more time in which to solve the problem, the release of water may not have been necessary. But, under these circumstances, the release was justified. We note with approval that the district court, in anticipation of future occurrences, ordered a report on means of meeting irrigation users' needs with less impact on the salmon run.

We affirm the district court's orders.

FOOTNOTES

1/ Although neither side argues that mootness or lack of finality bar our jurisdiction, we must examine this issue on

our own initiative. Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152 (1908); Willis vs. Craig, 555 F.2d 724, 726 (9th Cir. 1977).

We find no lack of finality because we have reviewed similar orders issued by the district court pursuant to its continuing jurisdiction over the consent decree. See Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 626 F.2d 95 (9th Cir. 1980), cert. denied, 449 U.S. 1079 (1981). Nor is this case moot because the challenged orders could not be fully litigated prior to the end of their effective period and the situation may arise again. Weinstein v. Bradford, 423 U.S. 147, 1498 (1975) (per curiam).

2/ Paragraph 20 of the consent decree reads in part: "The rights of any claimants to water of the Yakima River or watershed who are not parties to this case shall in no way be prejudiced or affected by this judgment . . . . "

3/ The state, as amicus curiae, also urges this ground for reversal. According to its papers, the United States' motion to dismiss the state proceeding was denied. The United States then petitioned for reconsideration in light of our recent decisions of Northern Cheyenne Tribe v. Adsit, 668 F.2d 1080 (9th Cir. 1982), San Carlos Apache Tribe v. State of Arizona, 668 F.2d 1093 (9th Cir. 1982), and Navajo Nation v. United States, 668 F.2d 1100 (9th Cir. 1982).

Notwithstanding our decisions in these cases, the state court determined that it had jurisdiction over the United States as a representative of federally reserved Indian water rights. This decision was not timely appealed by the United States, but the Sunnyside Valley Irrigation District moved for discretionary review by the state appellate court. As of oral argument in our case, the state appellate court had not accepted review.

4/ The factors weighing in favor of dismissal in Akin were: (1) that the McCarran Amendment evinced a clear federal policy in favor of general, unified water rights adjudication; (2) that the state had a comprehensive system for adjudicating and managing water rights; (3) that the United States had filed only its complaint in federal court before the defendants moved to dismiss in favor of the state proceeding; (4) that over 1000 defendants were named, indicating extensive involvement of state water rights; (5) that the federal court was located further from the area in question; and (6) that in other state water divisions, the United States had voluntarily participated in ongoing state water adjudication.

5/ The Treaty's purpose of preserving fishing rights of the Yakima Nation would not have been totally frustrated without the release of water. The temporary lack of water did not threaten either their access to traditional fishing grounds, or the entire

salmon run. The possible destruction of redds did threaten to diminish the value of their fishing right, but release of water was not the only apparent solution to prevent the destruction. Compare Cappaert v. United States, 426 U.S. 128 (1976) (District court could not find feasible alternatives for preserving the Devil's Pool and its rare fish other than maintaining the water level in the Pool).

A federal reservation of land contains an implicit reservation of water only if the purposes for which the land is reserved require water. Id. at 139. in Cappaert, the President set aside the Devil's Pool as a national monument because of its historic and scientific value. The reservation of the Pool would have been meaningless, however, if the water level was allowed to drop significantly. Id. at 140.

When pumping of ground water by nearby ranchers lowered the water in the Pool beyond safe levels, the district court enjoined further pumping based on an implied-reserved-water right. The Court affirmed the existence of this right, and further approved the district court's decision that the water in the Pool could drop so long as the necessary level was maintained. The court held that "the implied-reservation-of-water-rights doctrine . . . reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." Id. at 141 (our emphasis).

Cases use the same analysis in determining whether Indian reservations contain implicit rights to various bodies of water. See Arizona v. California, 373 U.S. 546 (1963) (reserved water right necessary to fulfill agricultural purpose of the land, in amount that will irrigate all practicably irrigable land on the reservation); Winters v. United States, 207 U.S. 564 (1908) (reservation of land useless unless imply a right to sufficient water to irrigate it); Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir.), cert. denied, 102 S.Ct. 657 (1981) (water right necessary to fulfill treaty purpose of ensuring access to fishing grounds). In each case, a guaranteed supply of water was required to preserve the reservations' purposes. Without the reserved water right, others could appropriate the water, frustrating the reservation.

Unlike these cases, correction of the redds problem does not require a guaranteed supply of water, to which others may not have access. The government's interference with the water level during the spawning season required the district court to take emergency measures, which included for a time releasing water from the dam. These measures were justified by the government's violation of its Treaty duties, not by any implied-reserved-water-right to water stored in the Cle Elum reservoir.

6/ The 1945 decree resulted from a suit filed by the United States in 1939, seeking a declaration of their responsibilities to

various contract holders in the Yakima Irrigation System. Neither side joined the additional parties that would have been necessary for a general adjudication. The final decree settled only the rights of the irrigation districts made party to the proceeding.

In contrast, in Truckee the government framed its complaint in the broadest possible manner. It provided individual notice and widespread publicity of the action. The court gave interested parties every opportunity to present their claims in hearings over several years. The proceeding was adversarial and finally determined the rights of all involved. United States v. Truckee-Carson Irrigation District, 649 F.2d 1286, 1308-1309 (9th Cir. 1981).

7/ At the November 25, 1980 hearing, the district court in fact observed that:

> I don't have any feeling at all that the irrigators in this case would prefer the salmon just disappear. I don't sense that feeling at all. I think they are sincere and legitimate in their concern about the waterflow, but I also feel that they are sincere in their concern for the salmon and, of course, the rights of the [I]ndians in regard thereto.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KITTITAS RECLAMATION DISTRICT, et al.,	)	
Plaintiff,	)	Civil No. 21
v.	)	INSTRUCTIONS TO THE WATERMASTER
SUNNYSIDE VALLEY IRRIGATION DISTRICT, et al.,	)	
Defendants.	)	

THIS MATTER came on regularly for hearing on October 29, 1980, upon a motion on behalf of William G. Gray, the duly appointed and acting Watermaster in this proceeding, for instructions from this Court concerning the proper operation and management of certain reservoir facilities of the Yakima Reclamation Project during the non-irrigation season from October, 1980, to April 1981, in consideration of the

provisions of the 1945 consent decree on file in this case and the request of the Yakima Indian Nation that a flow of water in portions of the Yakima River be maintained to protect certain spawning areas for Spring Chinook Salmon in the Upper Yakima River Basin; and

The Watermaster appearing by Robert M. Sweeney, Assistant United States Attorney, and George Dysart, Department of Justice attorney, appearing for the Department of the Interior, and the Yakima Indian Nation appearing by James B. Hovis and Timothy Weaver, Attorneys at Law; and various irrigation districts named in the 1945 consent decree appearing by Donald H. Bond, Dennis Fluegee, Robert Frazier, Jay Sandlin, Charles Flower, and Jeffrey Simpson, Attorneys at Law; and

It appearing that it is the usual practice of the Project Manager of the Yakima Reclamation Project, (who is also the Watermaster in this action), to reduce flows from the various Project reservoirs at the end of the irrigation season in mid-October to provide for "carry-over" storage water for use during the next year's irrigation season, which closures significantly reduce the flow of water in the Yakima River; and at the end of the 1980 irrigation season the gates of the Lake Cle Elum reservoir were scheduled for closure on October 20, 1980; and

It further appearing that during the salmon spawning season in late summer of 1980 certain Spring Chinook Salmon migrated up the Yakima River and spawned in certain portions of the upper Yakima River and that some sixty "redds" or spawning areas have been

identified in that portion of the Yakima River lying between the entry of the Lake Cle Elum River into the Yakima River, and the Yakima Indian Nation has requested William Gray as Project Manager to maintain a sufficient flow in the afore-described reach of the Yakima River to safeguard the development of salmon fry from the redds, upon the Tribe's assertion that the salmon spawning area in the upper Yakima River Basin is a part of a fishery reserved to the Yakima Indian Nation and it's members pursuant to its treaty with the United States of June 9, 1855, and

It appearing that Mr. Gray has delayed the closing of the Lake Cle Elum Reservoir gates and has met with representatives of the Yakima Indian Nation, the irrigation districts, and the Fish and Wildlife Service

of the Department of the Interior, and that the Court has been requested to issue instructions to the Watermaster concerning the management of the facilities of the Project and the waters within the reservoirs and the Yakima River in view of the conflicting interests as to the management of said waters; and

Attorney George Dysart having requested that some additional time be granted before closure of the reservoir gates in order to allow the Secretary of the Interior to investigate the situation and to consider any possible alternative methods of operation that might be available; NOW, THEREFORE, upon consideration of the foregoing,

IT IS ORDERED AND DECREED AND THE WATERMASTER IS INSTRUCTED as follows:

1. That to and until 8:00, A.M., Friday, November 28, 1980, a sufficient flow of water not to exceed 650 c.f.s., (as measured at the Bureau of Reclamation gauging station on the Yakima River at Cle Elum), shall be maintained in that portion of the Yakima River lying between the confluences of the Cle Elum River and the Teanaway to protect and safeguard as nearly as possible the Spring Chinook Salmon Spawning area in that reach of the Yakima River; PROVIDED,

2. That the Watermaster is authorized to regulate the flows in the aforementioned reach of the Yakima River in such amount below 650 c.f.s., (as measured at the Bureau of Reclamation gauging station on the Yakima River at Cle Elum), as the Watermaster may find consistent with the protection of the spawning area after consultation with

biologists of the Fish and Wildlife Service of the Department of the Interior and the Yakima Indian Nation; and

3. That further hearing in this matter shall be held at 9:30, A.M., Tuesday, November 25, 1980, at the United States Courthouse in Spokane, Washington or at such earlier time or at such other place as may appear appropriate to the Court.

DATED this 31 day of October, 1980.

/s/ Justin L. Quackenbush
UNITED STATES DISTRICT JUDGE

Presented by:

/s/ Robert M. Sweeney
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KITTITAS RECLAMATION DISTRICT, et al.,	)	
Plaintiff,	)	Civil No. 21
v.	)	SUPPLEMENTAL INSTRUCTIONS TO THE WATERMASTER
SUNNYSIDE VALLEY IRRIGATION DISTRICT, et al.,	)	
Defendants.	)	

THIS MATTER came on regularly for hearing before this Court on November 25, 1980, pursuant to the Order of this Court entered October 31, 1980, directing that a further hearing be held to determine appropriate instructions to be issued to the Watermaster concerning the management of the reservoir facilities of the Yakima Reclamation Project during the non-irrigation period of October, 1980, to March/April, 1981; in view of certain Spring Chinook

Salmon spawning beds (hereafter referred to as "redds") having been located in that portion of the upper Yakima River lying between the confluences of the Lake Cle Elum River and the Teanaway River and the Yakima River; and

The Watermaster, William R. Gray, appearing by Robert M. Sweeney, Assistant United States Attorney, and the United States appearing by George D. Dysart, Attorney, Lands and Natural Resources Division, Department of Justice; and the Confederated Tribes of the Yakima Nation, Amicus, appearing by James B. Hovis and Timothy Weaver, Attorneys at Law; and various irrigation districts named in the 1945 consent decree entered in this proceeding appearing by Donald H. Bond, Dennis L. Fluegge, Charles C. Flower, J. Jarrette

Sandlin, V. J. Beaulaurier, J. M. McArdle, Thomas Nelson, Robert M. Leadon, and H. K. Dano, Attorneys at Law.

It appearing to the Court as follows:

1. That in September, 1980, certain return Spring Chinook Salmon migrated up the Yakima River and spawned in portions of the upper Yakima River and fish biologists have located and identified some sixty spawning redds in that reach of the Yakima River lying between the confluences of the Lake Cle Elum River and the Teanaway River; and

2. That following hearing on October 29, 1980, this Court on October 31, 1980, entered Instructions to the Watermaster which, among other things, directed the Watermaster to maintain a flow of water of approximately 650 c.f.s. in that portion of the Yakima River lying between the

confluences of the Lake Cle Elum River and the Teanaway River so as to protect and safeguard as nearly as possible the Spring Chinook Salmon spawning redds in that reach of the River; and also directed that further hearing in the matter be held commencing on November 25, 1980; and

3. That certain of the aforementioned sixty salmon redds lying in certain side channels or on the periphery of the Yakima River channel are in immenent danger of damage and that measures could be taken to safeguard these redds by channelization of water flows and transfer of certain redds to more protected areas of the River, if such measures are implemented on an emergency basis; and

4. The United States appeared herein and advised this Court that the Secretary of

the Interior, among other things, recommends that sufficient waters be maintained in the Yakima River to provide nearly as possible for the development of the redds and the emergence of fry and that the stream conditions and reservoir releases be monitored to provide such protection as may be appropriate upon the advice of biologists of the United States.

5. That it is appropriate that the provisions of paragraphs 1 and 2, at page 3, of this Court's Instructions to the Watermaster entered October 31, 1980, be continued in effect through the remainder of the non-irrigation season, as supplemented hereafter, NOW THEREFORE,

IT IS ORDERED AND DECREED AND THE WATERMASTER IS INSTRUCTED as follows:

1. That for the remainder of the 1980 to 1981 non-irrigation season, a sufficient flow of water approximating 650 c.f.s. (as measured by the Bureau of Reclamation gauging station on the Yakima River at Cle Elum) shall be maintained in that portion of the Yakima river lying between the confluences of the Cle Elum River and the Teanaway River to protect and safeguard as nearly as possible the Spring Chinook Salmon spawning area in that reach of the Yakima River; PROVIDED, however, that the Watermaster is authorized to regulate the flow in the aforementioned reach of the Yakima River in such amounts below 650 c.f.s., (as measured at the Bureau of Reclamation gauging station on the Yakima River at Cle Elum), as the Watermaster in his discretion may find consistent with protection of the spawning area after consul-

tation with fish biologists of the Fish and Wildlife Service and the Yakima Tribe, and including Doctor Ernest A. Brannon and Dr. Victor W. Kaczynski,

2. That the Watermaster shall consult as soon as possible with the above-identified biologists and shall expeditiously undertake such protective measures as the Watermaster finds appropriate, including the following:

a. Transfer of the salmon eggs in those redds (approximately 12) found to be in imminent danger of damage to an appropriate area of the Yakima River as recommended by Drs. Brannon and Kaczynski.

b. Construct berms at the entry into certain side channels to deflect waters into such channels as recommended by Drs. Brannon and Kaczynski.

c. Open the effluent ends of such side channels as recommended by Drs. Brannon and Kaczynski.

3. That the Watermaster shall continue to consult with the above-identified biologists so as to provide for the continuing monitoring of the conditions of the salmon redds and the flows in the Yakima river with the view by the Watermaster in exercise of his informed discretion to provide for reduction in flows of the river insofar as such reduction may be consistent with the protection of the spawning area.

4. That the parties to this matter, and the Watermaster, shall study and report to the Court prior to the 1981 irrigation water delivery season on means by which the needs of the Project water users can be met through more efficient or less extensive use

of Project waters or by modification of Project operations or facilities so as to have less impact on the fisheries resource, including the possibility of management of the various Project reservoirs and releases of water so as to provide for appropriate water flows during the spawning and hatching periods that may be practicable while at the same time providing water for irrigation purposes for users within the Project area.

DATED this 28 of November, 1980.

/s/ Justin L. Quackenbush
UNITED STATES DISTRICT JUDGE

Presented by:

/s/ Robert M. Sweeney
Assistant United States Attorney
Attorney for Watermaster
P. O. Box 1494
Spokane, WA 99210
Telephone: (509) 456-3811

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WASHINGTON

It appearing by the report of the Joint Congressional Commission, created under section twenty-three of the Indian Appropriation Act, approved June thirtieth, nineteen hundred and thirteen (Senate Document Number Three hundred and thirty-seven, Sixty-third Congress, second session), that the Indians of the Yakima Reservation in the State of Washington, have been unjustly deprived of the portion of the natural flow of the Yakima River to which they are equitably entitled for the purposes of irrigation, having only been allowed one hundred and forty-seven cubic feet per second, the Secretary of the Interior is

hereby authorized and directed to furnish at the northern boundary of said Yakima Indian Reservation, in perpetuity, enough water, in addition to the one hundred and forty-seven cubic feet per second heretofore allotted to said Indians, so that there shall be, during the low-water irrigation season, at least seven hundred and twenty cubic feet per second of water available when needed for irrigation, this quantity being considered as equivalent to and in satisfaction of the rights of the Indians in the low-water flow of Yakima River and adequate for the irrigation of forty acres of each Indian allotment; the apportionment of this water to be made under the direction of the Secretary of the Interior, and there is hereby authorized to be appropriated the sum of $635,000 to pay for said water to be covered

into the reclamation fund; the amount to be appropriated annually in installments upon estimates certified to Congress by the Secretary of the Treasury. One hundred thousand dollars is hereby appropriated to pay the first installment of the amount herein authorized to be expended, and the Secretary of the Interior is hereby directed to prepare and submit to Congress the most feasible and economical plan for the distribution of said water upon the lands of said Yakima Reservation, in connection with the present system and with a view to reimbursing the Government for any sum it may have expended or may expend for a complete irrigation system for said reservation.

For operation and maintenance of the irrigation system on lands allotted to Yakima Indians in Washington, $15,000, reimbursable in accordance with the provisions of the Act of March first, nineteen hundred and seven.

Act of August 1, 1914.
38 Stat. 582, 604

STATEMENT TO THE COURT

Foreword

This action was instituted for the purpose of having the court determine whether the United States is obligated to deliver water without charge to land within the Sunnyside Valley Irrigation District situated in the Yakima Reclamation Project in excess of that which the Bureau of Reclamation had determined the landowners were entitled to under water contracts which they hold. The court was further requested to determine, assuming that it ruled in favor of the water users, as to the extent and nature of their rights so far as they relate to the rights of other users who are involved in the proceedings.

During the pendency of the instant case, the United States Circuit Court of Appeals

for the District of Columbia rendered its decision in the case of Fox V. Ickes, 137 F. (2d) 30, certiorari denied, 320 U. S. 792. The court in that case had before it for interpretation and construction the contracts of certain of the users within the Sunnyside Valley Irrigation District. The decision held in effect that the rights of the appellants in the proceeding, under their contracts, were to be determined on the basis of beneficial use and that the Bureau of Reclamation was without authority to increase the charges specified in the contracts of those users. That decision rendered moot the first proposition before the court in the case under consideration and left only the matter of the respective rights of the water users within the project undeter-

mined. Under the circumstances created by the foregoing decision it seemed very desirable to settle amicably the remaining phase of the controversy thus dispensing with extended litigation which would, as a result of cross complaints filed by certain of the defendants, necessitate an adjudication of the Yakima River. Accordingly, negotiations were undertaken which have resulted in the approval of a consent judgment by the attorneys for the litigants.

The proposed judgment in so far as it pertains to the parties before the court grants judicial recognition of those rights in the natural flow of the Yakima River which existed at the time the construction of the Yakima Project was undertaken; it likewise grants recognition of the rights of the users whose claims are based upon contracts with

the Bureau of Reclamation; it establishes a formula for proration, dependent upon the nature of the rights involved, during a period when the available supply of water is inadequate to meet the needs of all of the water users; it enjoins and restrains the parties before the court from contesting or otherwise interfering with the rights thereunder recognized; and it retains to the court jurisdiction so far as essential for proper administration and for the purpose of appointing a watermaster if in its discretion such appointment is necessary. The consent judgment does not in any way affect an adjudication as to the priority of the respective water users in the action in so far as they relate to other users of water from the Yakima River who are not litigants. Further, administrative acceptance of the

judgment by the interested agencies of the United States, the Bureau of Reclamation and the Office of Indian Affairs, has been expressed.

Summary of Facts and Legal Aspects with Respect to the Rights of the Parties to the Action.

The Yakima Reclamation Project, hereafter referred to as the Project, was originally initiated by the Bureau of Reclamation pursuant to the provisions of the Reclamation Law (43 U.S.C. 371), hereafter referred to as the Reclamation Law. The required investigation of the Project was undertaken in the year 1905 and its construction was started shortly after that date. For the purposes of administration the Project was divided into the Sunnyside Division composed of several irrigation districts, Tieton Division which is

administered by the Yakima-Tieton Irrigation District, Roza Division administered by the Roza Irrigation District, Kittitas Division administered by the Kittitas Reclamation District, and the Wapato Division which is situated within the Yakima Indian Reservation.

The normal flow of the Yakima River which constitutes the source of supply for the lands susceptible of irrigation within the Project is insufficient to meet the needs of all the water users during the months of July, August, and September. To remedy this situation the Bureau of Reclamation undertook the construction of storage reservoirs to impound the early spring run-off and flood water. The records kept by the Bureau of Reclamation disclose that the original plans for the development of the Yakima Project

contemplated the construction of all five of the divisions to which reference has been made. It further appears that the water for which the United States made its filing of intention to appropriate was for the Project as a whole.

At the time the construction work was initiated, it is still being continued in the Roza Division, lands within the Sunnyside Division in what is now part of the Sunnyside Valley Irrigation District, were being served by the Washington Irrigation Company. The United States acquired the irrigation system of that company subject to the interests of the water users served by the company who held contracts for specific quantities of water. The carrying capacity of the Washington Irrigation Company's canal was at the time of transfer to the United States

approximately 650 c.f.s. The rights of these users were based upon a filing made by a predecessor of the Washington Irrigation Company which expressed an intention of the appropriator to ultimately divert 1,000 c.f.s. of water. The transfer to the United States was completed prior to the time that the full 1,000 c.f.s. filed on by the Company was applied to beneficial use and while it was diverting about 815 c.f.s.

In addition to the direct flow right arising from the appropriation of the Washington Irrigation Company, or its predecessor, to which the lands within the Sunnyside Valley Irrigation District are entitled, the United States has in the past recognized an additional 25 c.f.s. known as the Prosser Falls Land & Power Company right.

Pursuant to its plan the Bureau of Reclamation enlarged and extended the canal which it had acquired from the Washington Irrigation Company to serve an additional area approximately as large as the acreage which receives water from the original system. The landowners within the area served by the extended and enlarged canal contracted with the Bureau of Reclamation pursuant to the Reclamation Law for their supply of water. These rights are referred to as public notice rights. Certain of the users within the area who had previously received their supply of water from the original system through contract with the Bureau of Reclamation acquired additional rights to supplement those for which they had already contracted. Such rights are referred to as supplemental

rights. Other users refused to contract with the Bureau of Reclamation basing their claims to water on their original contracts with the Washington Irrigation Company. There are, therefore, within the Sunnyside Valley Irrigation District four types of water rights: (a) those based on original contracts with the Washington Irrigation Company; (b) those referred to as supplemental rights; (c) the public notice lands; and (d) Warren Act Lands. Therefore, without including the public notice lands the users within the Sunnyside Valley Irrigation District have water rights aggregating approximately 640 c.f.s. which have in the past been recognized by the United States.

As part of the original development under the Reclamation Law the Bureau of Reclamation undertook the development of the Yakima-Tieton Division. The rights of the users within that Division are identical in character with the public notice rights in the Sunnyside Valley Irrigation District. The division in question has in the past diverted a maximum of about 330 c.f.s. Due to the limited carrying capacity of the system and the large proportionate acreage served by that system, in a normal year the water users receive a supply which is considered to be a minimum for crop production.

Subsequent to the development of the Sunnyside and Tieton Divisions the Bureau of Reclamation constructed additional storage reservoirs to serve the water users within

the Yakima Project. Pursuant to the Act of February 21, 1911, Ch. 141, 36 Stat. 925, 43 U.S.C. 523 et seq., hereafter referred to as the Warren Act, the Secretary of the Interior was authorized to contract for the disposition of stored water in excess of the needs of the project, preserving, however, "a first right to land and entrymen under the project." The quoted provision would in the instant case apply to water users in the Sunnyside Valley Irrigation District and the Tieton Division. Although never formally passed upon by the courts, the Warren Act appears to vest in the project users a priority over the Warren Act contractors. In the administration of its projects the Bureau of Reclamation has recognized such a priority between public notice rights and Warren Act rights.

The water which was developed pursuant to the Warren Act was sold under contract to the Kittitas Reclamation District, the Roza Irrigation District, to the irrigation districts within the Sunnyside Division which are set forth in paragraph 3 of the judgment other than the Sunnyside Valley Irrigation District, to those districts referred to in the judgment commencing at paragraph 8 through paragraph 16, exclusive of the Cascade Irrigation District, to the Indian Service and to certain other users not parties to the suit.

In most instances, the Warren Act contracts themselves specifically recognize the priority of the water users within the Sunnyside Valley Irrigation District who base their claims to water on contracts originally entered into with the Washington Irrigation

Company. Also the contracts, although somewhat ambiguous on the point, disclose language which might well have been intended to concede to the holders of public notice rights in the Sunnyside Valley Irrigation District and the Tieton Irrigation District a similar priority.

Further, with respect to the rights of the users in the Sunnyside Valley Irrigation District and the Tieton Division, there is no doubt that they had placed to a beneficial use quantities of water at least equal to that which they will receive pursuant to the proposed consent judgment which will not be subject to proration with Warren Act users.

In addition to the water rights to which reference is made above, there is involved in the litigation the right of the Yakima Indian Reservation to a supply of water from the

Yakima River. By the Act of August 1, 1914, Ch. 222, 38 Stat. 582, the Congress of the United States claimed for the tribe in question 720 c.f.s. of water in the low water flow of the Yakima River. Over and above the 720 c.f.s. the Yakima Reservation receives 350,000 acre feet of water pursuant to agreements entered into between the Bureau of Reclamation and the Office of Indian Affairs. These later rights are derived from water made available as the result of the furnishing of storage capacity under the Warren Act. In the proposed consent judgment, the rights last mentioned to which the Indians are entitled are considered in the same light and are subject to the same limitations as other Warren Act rights.

Over and above the foregoing rights there is another class of claims to water

from the Yakima River which are affected by the judgment. They, like the claims of the Washington Irrigation Company and the Prosser Falls Land & Power Company claim, were initiated prior to the time that development of the Yakima Project was undertaken. In most instances these claimants by instruments called limiting agreements, executed in consideration of the construction of the project by the United States, defined the maximum quantities which those users would divert from the source of supply under their appropriation. The judgment recognizes these claims and also the rights of other claimants on the river who, although having refused to sign limiting agreements, have perfected rights of which the Bureau of Reclamation has always taken cognizance.

A factor important in attaining the settlement contained in the proposed judgment was the willingness of the Kittitas Reclamation District to release back to the United States certain of the water which it presently holds under contract for sale to other districts within the Project. The interest or responsibility of the United States, however, is not affected by transfer of the rights as it will merely look to the purchasers for the payments which the Kittitas District was formerly obligated to make.

The consent judgment provides a basis of apportionment of the available supply of water which has been agreed to by the principal diverters from the stream. By the entry of the consent judgment there will be established a basis upon which the Bureau of

Reclamation or a watermaster if one is appointed may divert to the users quantities of water agreed upon by them without the danger of encroaching upon the legally constituted rights of other users within the Project. Briefly the consent judgment as drafted fixes the rights of the parties as among themselves as follows:

(a) There is recognized in the Sunnyside Valley Irrigation District a right to 725 c.f.s. of water which will not be subject to proration with the Warren Act users in a period of shortage. Of this quantity 50 c.f.s. may be measureable return flow from the Roza Division thereby affecting what may in the future be an appreciable reduction of that district's claim to water from storage and natural flow. It has been estimated by the Bureau of Reclamation that

the recognition in the Sunnyside Valley Irrigation District of a right to 725 c.f.s. undiminished in a period of inadequate supply will insure that district of a quantity of water within 6% of normal during a period of one-third shortage.

(b) There is recognized in the proposed consent judgment the rights of the Tieton Division to 250 c.f.s. which has the same status as the rights of the Sunnyside Valley Irrigation District which are exempt from proration. This is a reduction of 80 c.f.s. from the maximum quantity which that division has in the past diverted. If the judgment is entered as drafted in a period of one-third shortage it has been estimated by the Bureau of Reclamation that the division in question would experience a reduction from normal of approximately 10%. However, there has been

transferred 18,000 acre feet from the Kittitas Reclamation District to the Tieton Division. It is probable therefore that the Tieton Division will not be forced to experience any reduction below normal supply in a period of extreme shortage.

(c) The Indian Service, for reasons above expressed, will receive an undiminished right to 720 c.f.s. The comments made with respect to the Warren Act users hereafter set forth will apply to the balance of the rights to which the Indian Service is entitled under the judgment.

(d) All of the rights to direct flow which have previously been recognized by the United States other than those specified are likewise exempt in full from proration by the judgment in so far as Warren Act users are concerned.

(e) The judgment recognizes the rights of Warren Act contractors to water in the amount specified in their contracts subject to the priorities set forth in the foregoing paragraphs (a), (b), (c), and (d). In a period of shortage these users must ultimately accept a proportionate reduction based on a formula set out in the judgment. The rights of the Sunnyside Valley Irrigation District and the Tieton Division, except as to the quantities exempt from proration, will likewise be subject to reduction based on the same formula.

The parties to the suit are, by the judgment, enjoined from asserting claims against each other or their successors and assigns in so far as the water rights covered by the judgment are concerned. The judgment does not, however, affect the rights of such

parties or users who are not within the jurisdiction of the court in the present proceeding. In addition, provision is made for the appointment by the court, if in its discretion such appointment is necessary, of a watermaster to be vested with such authority as the court deems appropriate in the administration of the Yakima Project. The court further retains jurisdiction over matters arising in the administration of the rights of the parties affected by the judgment and for the purpose of interpreting the provisions set forth in the judgment.

/s/ Edwin M. Connelly,
U.S. Attorney

/s/ William H. Veeder,
Department of Justice

/s/ D. G. Tyree,
Asst. Regional Counsel
Bureau of Reclamation

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

Kittitas Reclamation District, et al.,	)	
Plaintiffs,	)	Civil Action No. 21
vs.	)	
Sunnyside Valley Irrigation District, et al.,	)	
Defendants.	)	

IN THE MATTER OF THE ENTRY OF A CONSENT DECREE

BE IT REMEMBERED that the above entitled and numbered cause came on for hearing in the matter of the entry of a consent decree, before the Honorable L. B. Schwellenbach, Judge of the above entitled court, sitting at Yakima, Washington, at the hour of 9:10 o'clock p.m., January 31, 1945, the parties hereto appearing as follows: Mr. Edward M. Connelly, United States Attorney for said

District, appearing for the United States of America; Mr. D. G. Tyree, Assistant Regional Counsel, Bureau of Reclamation; Mr. William H. Veeder, Attorney for the Department of Justice; Mr. F. A. Kern, appearing on behalf of the Kittitas Reclamation District; Mr. Hugo F. Luhman, appearing on behalf of Selah & Moxee Irrigation District, Terrace Heights Irrigation District, and Yakima Reservation Irrigation District; Mr. V. O. Nichoson, appearing on behalf of Roza Irrigation District; Mr. C. P. Short, appearing on behalf of the West Side Irrigating Company and Cascade Irrigation District; Mr. John H. Lynch, appearing on behalf of Broadway Irrigation Company; Mr. Stephen E. Chaffee, appearing on behalf of Sunnyside Valley Irrigation District, Christina Mariea, Luis Luccolini and Euffemia Luccolini, his wife,

Mazine E. Fox and Josie R. Fox, his wife, Elmer A. Bacon and Artie Bacon, his wife, Phillip Louis Parks and Ollie D. Parks, his wife, Grandview Irrigation District, Granger Irrigation District, Prosser Irrigation District, Snipes Mountain Irrigation District, Outlook Irrigation District, Yakima-Tieton Irrigation District, Tieton Water Users Association, and Zillah Irrigation District;

WHEREUPON the following proceedings were had, to-wit:

MR. CONNELLY: May it please the Court in the case of Kittitas Reclamation District, and others, vs. Sunnyside Valley Irrigation District, and others, being Civil Cause No. 21, I wish to present to the Court the motion of the United States for an order for joinder

of a new defendant. The new defendant is the Cascade Irrigation District. I am basing the motion upon the consent of the directors of that district, previously filed, to the entry of such an order, making the Cascade Irrigation District a party to this action. Later it will appear that the Cascade Irrigation District consents to the entry of a decree which includes it as a codefendant.

THE COURT: All right; I will sign this order.

MR. CONNELLY: I now wish, if your Honor please, to move the admission to practice in this court, for the purposes of this proceeding only, Assistant Attorney General William H. Veeder, of the Lands Division of the Department of Justice, at Washington,

D.C., and D. G. Tyree, Assistant Regional Counsel of the Bureau of Reclamation. They are the attorneys who with these other gentlemen have effected this settlement, and who have worked out the details, and who, if the Court wishes to ask for details concerning the provisions of the decree, would be better fortified to answer them than I would be.

THE COURT: The motion to appear in this case is granted.

MR. CONNELLY: This was read to me after it was signed. I knew what it is, Your Honor. I would like to file it, with a motion for entry of final judgment in the action referred to, and in order to show the consent of Harry Olson, and the clients whom he

represents, I would like to file this telegram, with the motion for entry of final judgment, which I now hand to the Court, with the proposed judgment attached, and this, I understand, is on the agreement that Mr. Olson will sign the formal motion when he returns to Yakima.

We have prepared a rather extended summary of this judgment, if Your Honor please, but I believe that the preliminary statement of facts to the court, and the concluding statement of the order and judgment itself, together with any information which the Court may wish to elicit from the counsel who have worked extensively and actively on it, or from Mr. Ball, would suffice, rather than the reading of this ten-page statement.

THE COURT: I want to say this, as you all recognize this is a very important piece of litigation, which has been prosecuted in a number of courts in its different aspects for a number of years. I do not anticipate that it will be possible for me to familiarize myself with all of the facts which are involved in this litigation. I do not anticipate that there will be any necessity for that. However, I do take this position in this case, as I have in every case, that I have the responsibility of knowing what I am doing when I sign my name to an order or judgment or decree. I have to understand what it is about. When counsel for the various parties get together and effect a settlement, my attitude is one of the utmost sympathy with settlement. I do not ask for an explanation with the idea of interposing

an objection to it, but for the simple reason that I believe if I sign a judgment in this case, even though it has been agreed to by all the parties, that I have the responsibility of knowing what it is about, and I want a sufficiently complete statement so I will be satisfied in my own mind I am doing what I should do.

MR. CONNELLY: I shall read all I have then. I was economizing on time.

THE COURT: Do not read it too fast.

MR. CONNELLY: I shall not, Your Honor.

* * *

The omitted colloquy consists of a verbatim reading by Mr. Connelly of the

"Statement to the Court" reproduced at pages A-77 to A-98 of this Appendix.

* * *

I would like to file that in the proceedings.

THE COURT: All right. Let us start out with this Indian business. Is that all in the Wapato Division, Mr. Veeder? I say, are all the Indian rights under that?

MR. VEEDER: Yes, sir; paragraph 4, page 15 of the judgment.

THE COURT: In this 1914 Act the 720 cubic feet of water per second is the amount Congress fixed?

MR. VEEDER: Yes, sir. I might call attention to the fact that the judgment has been reviewed by the Department of the Interior, which represents the Indian Service, and all the articles have been reviewed and approved.

THE COURT: Do you consider that you represent the point of view of the Indian Service, Mr. Tyree?

MR. TYREE: No, sir.

MR. VEEDER: The Department of Justice represents the Indian Service, and Mr. Tyree represents the Bureau of Reclamation.

THE COURT: In addition to this 720 cubic feet they have 350,000 acre feet, and the

judgment provides for 250,000 acre feet, and 100,000 acre feet.

MR. VEEDER: Yes, Your Honor. There are two contracts, one the original contract for 250,000--I beg pardon--in the contract of March 9, 1921, there are 250,000 feet, and subsequent to that a contract for 100,000 feet was entered into, making an aggregate of 350,000.

THE COURT: When it says "the agreement of March 9, 1921, as amended by the agreement of September 3, 1936", that means instead of being 250,000 feet, it was 350,000.

MR. VEEDER: No; that is the amendment in the contract. In the contract it is 250,000 acre feet, and on page 14, the final

paragraph, there is set forth a reference to the other contract which was entered into on September 3, 1936, for 100,000 acre feet.

THE COURT: That is an amendment.

MR. VEEDER: No; that is another contract.

THE COURT: There are two contracts on September 3, 1936?

MR. VEEDER: That is correct.

THE COURT: Do these contracts, in so far as they refer to the 250,000 feet, or the 250,000, plus the 100,000 feet, recognize that the rights of the Indians were subject to the same limitations as anyone else, under the Warren Act?

MR. VEEDER: Yes, sir. There is a provision in the contract that it is subject to proration.

THE COURT: So the 1945 contract does not add any new element.

MR. VEEDER: That is right.

THE COURT: All right. Turn to page 2 of this statement. What I want to do is to go from this statement to the judgment. Where the statement says something, I want you to show me where the judgment covers it. Maybe we had better do that further along in the statement.

MR. VEEDER: Page 7.

THE COURT: "The consent judgment provides a basis of apportionment of the available supply of water which has been agreed to by the principal diverters from the stream. By the entry of the consent judgment there will be established a basis upon which the Bureau of Reclamation, or a watermaster, if one is appointed, may divert to the users quantities of water agreed upon by them without the danger of encroaching upon the legally constituted rights of other users within the Project." Where is this watermaster provision?

MR. VEEDER: That is the final paragraph on page 30.

THE COURT: You did not feel it necessary or proper to have anything in the judgment

which would establish any procedure by which the Court could appoint a watermaster?

MR. VEEDER: That was left entirely to the discretion of the Court, on application by the interested water users.

THE COURT: Well, suppose I wake up some morning and conclude I want a watermaster.

MR. VEEDER: I think the judgment provides you could appoint one.

THE COURT: I was wondering if you should not have some provision that somebody ought to ask for it before the Court could appoint a watermaster.

MR. VEEDER: We went into rather an extended discussion at that time among the attorneys, and I think it was the consensus that if at any time it was not on the water users' desire, it would be on your own motion. The Court could appoint a water-master. The mechanics were not set up.

THE COURT: It has received full consideration?

MR. VEEDER: I think it has. That was fully discussed.

THE COURT: All right. Then start at the bottom of page 7: "There is recognized in the Sunnyside Valley Irrigation District a right to 725 cubic feet per second."

MR. VEEDER: The reference to the Sunnyside Valley Irrigation District will be found at page 28 at the top of the page, subparagraph 5.

THE COURT: Mr. Chaffee, is it in accordance with the understanding of the Sunnyside Valley Irrigation District that the estimate of the Bureau of Reclamation of 725 cubic feet per second will keep within 6% of normal?

MR. CHAFFEE: It is substantially that, if the Court please. You see, the Sunnyside Valley Irrigation District has about 77,000 acres. There will be some run-back from Roza. I might state while I am on my feet, in connection with the Sunnyside Valley Irrigation District, in reference to this

point, and the other points involved, that that judgment is very satisfactory, because it in substance recognizes all the Sunnyside Valley Irrigation District has contended for over a period of twelve years' litigation. First, it recognizes beneficial use or past use as the measure of water rights. Second, the contract entered into provides there shall be no additional construction charge, and, third, it recognizes the rights of priority that substantially protects the rights-- it is so nearly up to the full amount that it is far better for the Sunnyside Valley Irrigation District to accept it than to litigate for additional priority--and, as a matter of fact, it is all the Sunnyside Valley Irrigation District has contended for.

This litigation arose really on three different points. First, the issuance of a public notice deprived the Sunnyside Valley Irrigation District water users of 25% of their rights, and charges them with a million dollars of construction charges, and, third, refuses to recognize any priority.

Now, this judgment, in the judgment and in the contract--and, by the way, in most of these districts a contract containing the same provisions that are contained in this consent judgment, have been voted on favorably by the water users. The Tieton Water Users Association, which I represent, the vote was twenty to one in favor of the proposed settlement, and at least two or three to one in all the rest of the districts; but in substance this decree and the contract grant all the relief we asked as

to the measure of our rights in a normal year, and also no additional construction costs, and, thirdly, the full amount--or nearly, within 6 to approximately 8% in a year of water shortage, where there is a 33-1/3 shortage. And we have some other rights to waste water, and we are below the road to a certain extent, and I might say for the Sunnyside Valley Irrigation District--and I might say I am one of the proposers of this consent judgment in the first instance, and representing the Tieton Water Users Association, it is very highly satisfactory.

It was submitted to the Board of Directors and passed upon unanimously by the Trustees of the Water Users Association, and passed upon unanimously in favor of it by the Tieton Water Users at an annual meeting.

And so this proposed settlement has been carefully considered at the meetings of the Sunnyside Valley Irrigation District. There was a series of meetings held prior to the time the contract was voted on, and it was fully explained, and the Directors sent out a statement explaining the settlement, and these water users of the various districts up and down the Valley are thoroughly acquainted with it, and they are in favor of the settlement.

In my opinion, it is the most fair and equitable adjustment that could be obtained, saving expensive litigation. This will release some of the Kittitas water supply and supplement the Tieton, so the Tieton would not be the bottleneck, and receive approximately the full amount in a short-water year--the full amount that they

needed, to keep their orchards alive. That is something that could not be worked out by litigation. The small districts receive 12,000 feet additional supply. That will give them a greater base to prorate on. Some things that might have been sore spots have been ironed out in this proposed consent judgment, and it covers the situation quite completely, and in effect there is an adjudication of the water rights of the Yakima River and its tributaries.

I do not think such a thing has ever been worked out before, where there are water rights so extensive as in the Yakima River, and adjudicated by a consent judgment like this, and this is probably the last one of any consequence to be adjudicated. It seems to me it is a very happy solution of this dispute that has been extending for a long

period of years, and I think it will work out to the benefit of the Yakima Valley as a whole and the water users in the Valley.

THE COURT: At the bottom of page 27, the 250,000 cubic feet per second, Tieton?

MR. CHAFFEE: That is very satisfactory to the Tieton people, as I said.

THE COURT: Now "B", page 8, Mr. Veeder?

MR. VEEDER: This is referred to as the limiting agreement, which at the time of the institution and construction of the Yakima Project was signed by the users that had a direct flow at the time the construction was started.

This judgment leaves those rights intact, and recognizes they are subject to judicial recognition. Those limiting agreement rights were very largely covered by contracts which the water users had. In other words, when they contracted for certain storage rights, the contract also recognizes the rights they had to the direct flow from the Yakima River.

THE COURT: That is covered by the paragraph on the top of page 20?

MR. VEEDER: Yes, Your Honor.

THE COURT: Does that answer the question that I have to ask sometime? You have an agreement here between certain water users by districts. I do have to be sure you have not

taken away from people who are not parties to this action their rights in the division between the parties to the action.

MR. VEEDER: We have tried to cover that very explicitly throughout the judgment, and we have made a provision that these rights that are not covered are in no way affected. That is set forth in paragraph No. 20.

THE COURT: "The rights of any of the claimants to water of the Yakima River."

MR. VEEDER: It is on page 20.

THE COURT: That is what I am reading. "The rights of any of the claimants to water of the Yakima River or water shed who are not parties to this cause, shall in no way be

appearing for Roza Irrigation; C. P. Short, appearing for West Side Irrigating Company, and Cascade Irrigation District; John H. Lynch, appearing for Broadway Irrigation Company; Stephen E. Chaffee, appearing for Sunnyside Valley Irrigation District, and a number of other parties. I have not had time to copy them off the motion.

THE COURT: Is there any one of the counsel who feels there is any matter you want to present now, any discussion you want to bring up, or any questions you want to ask?

MR. LYNCH: If Your Honor please, I represent a small company that purchased 700 acre feet of water, a private corporation, a community corporation. It is not organized

in a district. We have there a contract for the purchase of Warren Act water, and it contains general provisions for a proration of the water in short years, but the method to be pursued in making that proration is not definitely specified.

As to all those Warren Act water users, if they are all on the same plane we have no objection to being bound by the consent decree, but if it happens that some of these Warren Act users are given priority, and transferred from one section to the other, and given priorities to Warren Act water held by some other districts, or something, I would like to have that cleared up, if there is any such preference.

As I recall it, there are certain waters that were sold by the Kittitas Reclamation

prejudiced or affected by the judgment, nor will it in any way prejudice or affect the rights of the parties to this judgment as they may pertain to the rights of such claimants."

I do not want to be hypertechnical, but I am wondering if the words "of the" in the next to the last line, on page 20, should not be deleted. Should it not be "the rights of any claimants to water"? In the first sentence you say: "This judgment shall constitute a final determination of the obligation of the United States to deliver water from the Yakima River and its tributaries", and in the second paragraph: "Each of the parties to this cause, their grantees, successors and assigns, are by this judgment forever enjoined and restrained from asserting any claim to or from interfering

with the use or the delivery of those quantities of water which are recognized in this judgment."

Now, for the purpose of this analysis, leave out the first sentence, because that does not refer to it. You go on to say "the rights of any of the claimants to water". You are referring up above to claims for water. "The rights of any claimants to water of the Yakima River or water shed who are not parties to this cause."

MR. VEEDER: Striking out "of the" immediately after the word "any". I think your suggestion improves the sentence.

THE COURT: I do not want to do it unnecessarily, or if it might change the meaning of it. You are referring to claims

up above "Each of the parties to this cause are enjoined from asserting any claim". They are not claimants and they are enjoined, and you go on "The rights of any of the claimants to water who are not parties." You have the rights to any claim. You would eliminate the possibility it might refer back to the second sentence of that paragraph.

MR. VEEDER: I think that would improve it. I see no reason why it should not be done.

THE COURT: We will tentatively leave that out. "The judgment recognizes the rights of Warren Act contractors to water in the amount specified in their contracts subject to the priorities set forth in the foregoing paragraphs a, b, c and d. In a period of shortage these users must ultimately accept a

proportionate reduction based on a formula set out in the judgment." "The judgment recognizes the rights of Warren Act contractors to water in the amount specified in their contracts." I would like to have you show me the part of the judgment supporting that statement.

MR. VEEDER: The judgment throughout recognizes the Warren Act rights by a resume in each paragraph, which contains various amounts, and those users are Warren Act users, and the quantity of water specified in each of those paragraphs is the amount of water the users are entitled to under their contract.

Now, the judgment recognizes certain preferential rights. The 725 cubic feet per second in the Sunnyside Valley Irrigation

District; the Tieton Division, 250 cubic feet per second; the Indian Service, 720 cubic feet per second. The Warren Act contractors' rights will be forced to prorate in a period of shortage, whereas under the judgment those holding the preferential rights will not be forced to prorate. The provisions for proration appear in paragraph 18, on page 26, in which it is specified these waters which will be subject to proration. In other words, all the rights that are referred to in paragraph 18 which will have to sustain a prorata diminution in case of shortage pertain to Warren Act users. The remaining ones have the preference, in accordance with the judgment.

THE COURT: All right. Now, Mr. Kern, I would like to have a statement from you. You

are furnishing the wherewithal. I want a statement in the record of the attitude of the Kittitas Reclamation District.

MR. KERN: I might say this, before there was any work in connection with trying to work out this consent decree, we had had negotiations with the Tieton Project to sell them some of our water.

The acreage in the Kittitas Reclamation District has been reduced on point classification of the land, and we would have this additional water, and we were glad to dispose of it, and then our schedule was changed. We had a very large excess of water before the first of July, and we had to use up 40% of our water by the first of July, so that we only had 60% after the first of July. We did not use the 40%, and that changed our

schedule and permitted us to use 2⅜ more after the first of July than before the first of July, and that gives us more water after the first of July, and that caused 20,000 acre feet of water to be taken from our supply before the first of July, and 10,000 after the first of July, and with that change in the schedule it left us in very good shape.

We are very well satisfied with the consent decree as drawn.

THE COURT: All right. I would like to have the record show specifically all of the signatories to the motion who are here. Moulton & Powell are not here. I would like to have the record show who are here.

THE CLERK: I have all of the attorneys who are here.

THE COURT: I would like to have the record show it, so Mr. Ridenour's record will show who is here participating in the actual presentation of this matter.

THE CLERK: I have those appearing: Mr. D. G. Tyree, Assistant Regional Counsel, Bureau of Reclamation; William H. Veeder, Attorney for the Department of Justice; Edward M. Connelly, appearing for the United States of America; F. A. Kern appearing on behalf of the Kittitas Reclamation District; Hugo F. Luhman, appearing for Selah & Moxee Irrigation District, Terrace Heights Irrigation District, and Yakima Reservation Irrigation District; V. O. Nichoson,

District from Warren Act water, is that right?

MR. KERN: Yes.

MR. LYNCH: A portion having been released by the District, and will be apportioned to other companies or districts or users, such as the Tieton, and perhaps some on the Reservation and some others.

Is it or is it not a fact that those transfers under the Warren Act will give the advantage in prorating over the other companies or districts which have water contracts?

MR. CHAFFEE: None whatever.

MR. VEEDER: There is no preference; they are all in the same position.

THE COURT: Does anyone else want to present a question?

MR. VEEDER: What about the language at the bottom of page 29?

THE COURT: I am going to sign this, and if you gentlemen decide you want to leave it the way it is, it is all right with me, or if you decide it might be desirable to eliminate these two words, that may be done. But I will sign the judgment. I do not want to do anything which might materially change the meaning of the judgment. It just seemed to me there might be some desirability to that,

Month	Acre-feet Per Acre
April	0.40
May	0.48
June	0.56
July	0.58
August	0.58
September	0.40
Total	3.00

The annual irrigation season shall be from April to September, inclusive, and the maximum rate of flow at the said points of delivery during any one month shall not exceed the following schedule:

April	14	second-feet
May	16	" "
June	21	" "
July	21	" "
August	21	" "
September	14	" "

Provided, however, that water solely from the natural flow of the Yakima River will be delivered by the United States during October, if desired by the District and found

available by the officer in charge of the administration of the water supply for the Yakima project.

The United States or its successor in the operation of the said Canal, in accordance with the contract of June 1, 1925, with the Grandview Irrigation District and the Prosser Irrigation District, shall deliver to the Prosser Irrigation District for use upon the 15.21 acres of land, to which reference is made in said contract, 2.75 acre-feet of water per acre; and the amount of water to be delivered to the Grandview Irrigation District pursuant to its contract with the United States, dated August 4, 1916, shall be reduced by the proportional amount applicable to the said 15.21 acres and the amount of water to be delivered by the United States pursuant to its contract with

but you gentlemen can talk about it and decide what you want to do.

MR. CHAFFEE: It is okeh with me. I think it would clarify it.

MR. CONNELLY: I think it would clarify it, and I think the suggestion is a good one.

THE COURT: If it is satisfactory to everybody, I will cross out the words "of the" and make it read "The rights of any claimants to water".

I want to congratulate you gentlemen and to thank you. The possibility of trying to adjudicate these water rights for the rest of my life has been hanging over me since May, 1942, and I have had in mind that when we got through with these Hanford cases I would have

to start on this matter. I know I could appoint a master, which is all right, but a couple of times a month the lawyers would decide the master needed instructions or something, and I looked forward to a ten-year job. I did not relish it very much, but I think you gentlemen are to be congratulated. Personally, I wish to thank you.

STATE OF WASHINGTON)
COUNTY OF SPOKANE)ss.

I hereby certify that the foregoing is a true and correct transcript of the proceedings therein shown, and the whole thereof, as reported by me in shorthand at the time and place hereinbefore stated.

Dated at Spokane, Washington, this 11th day of February, 1945.

(Signed) Egan Ridenour

Official Court Reporter.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

KITTITAS RECLAMATION DISTRICT; SELAH & MOXEE IRRIGATION DISTRICT; and UNITED STATES OF AMERICA,

Plaintiffs,

vs.

SUNNYSIDE VALLEY IRRIGATION DISTRICT; CHRISTINA MARIA EDER; LUIS LUCCOLINI and EUFFEMIA LUCCOLINI, his wife; MAZINE Z. FOX and JOSIE R. FOX, his wife; ELMER A. BACON and ARTIE BACON, his wife; PHILIP LOUIS PARKS and OLLIE D. PARKS, his wife; ROZA IRRIGATION DISTRICT; YAKIMA RESERVATION IRRIGATION DISTRICT; YAKIMA-TIETON IRRIGATION DISTRICT; TIETON WATER USERS' ASSOCIATION; GRANDVIEW IRRIGATION DISTRICT; GRANGER IRRIGATION DISTRICT; PROSSER IRRIGATION DISTRICT; SNIPES MOUNTAIN IRRIGATION DISTRICT; SUNNYSIDE IRRIGATION DISTRICT; ZILLAH IRRIGATION DIS-

NO. 21

J U D G M E N T

TRICT, BROADWAY IRRIGA-)
TION COMPANY, MOXEE DITCH)
COMPANY SUB-A; NACHES-)
SELAH IRRIGATION DISTRICT)
TERRACE HEIGHTS IRRIGA-)
TION DISTRICT; UNION GAP)
IRRIGATION DISTRICT; WEST)
SIDE IRRIGATING COMPANY;)
YAKIMA VALLEY CANAL)
COMPANY; OUTLOOK IRRIGA-)
TION DISTRICT; and)
CASCADE IRRIGATION)
DISTRICT;)
)
Defendants.)
)

The above-entitled cause having come on for hearing and it appearing to the Court that the plaintiffs and the defendants have concluded and settled all issues in this cause; that the parties hereto have joined in a Motion for Entry of Judgment; that the provisions hereafter set forth in this judgment constitute the agreement of the parties with respect to such issues; and that upon consideration of the records herein and

the Motion for Entry of Judgment the Court finds that the Motion for Entry of Judgment should be granted:

NOW, THEREFORE, it is ordered, adjudged and decreed as follows:

1. The defendants, Christina Mariea Eder, Luis Luccolini and Euffemia Luccolini, his wife, Mazine Z. Fox and Josie R. Fox, his wife, Elmer A. Bacon and Artie Bacon, his wife, Philip Louis Parks and Ollie D. Parks, his wife, and the Yakima Reservation Irrigation District are dismissed as defendants in this cause.

2. The obligations of the United States to deliver water from the natural flow of the Yakima River, and its tributaries, from storage in its various reservoirs on the Yakima watershed, and from other sources, to the plaintiffs, to the defendants, and to the

lands within the Wapato Indian Irrigation Project, are as set forth hereafter in this judgment.

3. SUNNYSIDE DIVISION.--The United States shall divert each year into the Sunnyside Main Canal, hereafter referred to as the Sunnyside Canal, to supply the water rights of the parties entitled to receive water from the Sunnyside Canal in the Sunnyside Division, a total quantity of 449,520 acre-feet of water on the following monthly schedule:

	Average Rate of Diversion in Cubic Feet per Second	Diversion in Acre-Feet
April	895	53,230
May	1,209	74,340
June	1,280	76,150
July	1,290	79,300
August	1,290	79,300
September	995	59,190
October	456	28,010
		449,520

The foregoing schedule of diversions shall be increased commensurate with the quantities of water to be acquired from the United States by the Grandview, Outlook, Granger, Prosser and Zillah Irrigation Districts, as set forth in paragraph 6 of this judgment: Provided, however, that the water acquired by these Districts shall not be diverted into the Sunnyside Canal when to do so would augment the schedule of diversions in excess of the safe carrying capacity of the Canal.

(a) SUNNYSIDE VALLEY IRRIGATION DISTRICT.--The United States shall divert annually into the Sunnyside Canal a total quantity of 340,944 acre-feet of water to supply the water rights of said District and the water users within the District, including water users who have no water right applications or contracts with the United States, on the following schedule:

	Average Rate of Delivery in Cubic Feet per Second	Delivery in Acre-feet
April	658	39,159
May	901	55,409
June	960	57,089
July	973	59,798
August	983	60,439
September	753	44,780
October	612	24,270
		340,944

(b) PROSSER IRRIGATION DISTRICT.--The United States shall divert into the Sunnyside Canal 7,347 acre-feet of water annually,

which quantity of water includes estimated losses in said Canal between the point of diversion and the point of delivery, and the United States or its successor in the operation of the said Canal shall deliver pursuant to the contract dated December 1, 1917, with the Prosser Irrigation District, at Mile 55.05 and Mile 59.32 of the Sunnyside Canal in an amount not exceeding the following schedule:

the Prosser Irrigation District dated December 1, 1917, shall be correspondingly increased.

The foregoing quantities of water for the Prosser Irrigation District shall be increased 2,500 acre-feet upon the execution of a contract for the acquisition of that quantity of water by the District and the United States as provided in paragraph 6 of this judgment. The increased quantity of water shall not, however, be diverted into the Sunnyside Canal when to do so would augment the schedule of diversions in excess of the safe carrying capacity of the Canal.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

(c) SNIPES MOUNTAIN IRRIGATION DISTRICT.--The United States shall divert into the Sunnyside Canal 9,247 acre-feet of water annually, which quantity of water includes estimated losses in said Canal between the point of diversion and the point of delivery, to supply the amounts of water provided for by contracts between the United States and the Snipes Mountain Irrigation District dated November 16, 1914, and July 11, 1931. There shall be delivered by the United States or its successor in the operation of the Sunnyside Canal a total of 5,265 acre-feet, pursuant to the contract dated November 16, 1914, between the United States and the Snipes Mountain Irrigation District, at the following points on the Snipes Mountain Canal: (a) at Mile 9.05, (b) at Mile 10.20, and (c) near Mile 6.42. The

annual irrigation season shall be from April to September, inclusive; the maximum rate of flow at the said points of delivery which the District may demand during any one month, based on the following schedule, shall be 17.7 cubic feet per second and the monthly supply of water shall not exceed the following monthly scheduled of deliveries:

Month	Acre-feet Total of Contract
April	685
May	840
June	1050
July	1055
August	950
September	685
Total	5265

Provided, however, that water solely from the natural flow of the Yakima River will be delivered by the United States during October, if desired by the District and found

available by the officer in charge of the administration of the water supply for the Yakima project.

In addition to the water supply provided for in said contract of November 16, 1914, the United States or its successors in the operation of the Sunnyside Canal pursuant to a contract dated July 11, 1931, with the District, shall deliver annually a total of 2874 acre-feet at the following points: (a) Mile 9.05 of the Snipes Mountain Canal; (b) at Mile 1.15 of the West Branch of the Snipes Mountain Canal; and (c) near Mile 6.42 of the Snipes Mountain Canal. The annual irrigation season shall be from April 1 to September 30, inclusive, and the mean monthly supply of water to be furnished under said contract shall not be in excess of the following

schedule of percentages of the total annual diversion:

Month	Per Cent	Acre-feet Total of Contract
April	10	287.40
May	16	459.84
June	19	546.06
July	21	603.54
August	20	574.80
September	14	402.36
Totals	100	2,874.00

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

(d) GRANDVIEW IRRIGATION DISTRICT.--The United States shall divert into the Sunnyside Canal 14,588 acre-feet of water annually which quantity of water includes estimated losses in said Canal between the point of diversion and the point of delivery, to supply the amounts of water provided for in

contracts between the United States and Grandview Irrigation District dated October 4, 1916, and February 21, 1933. The United States or its successor in the operation of the Sunnyside Canal shall deliver water pursuant to the said contracts at Mile 50.35 of the Sunnyside Canal and at Mile 2.87 of the Rocky Ford branch canal of the said Sunnyside Canal in an amount not exceeding the following monthly schedule:

Month	Acre-feet per acre
April	.36
May	.45
June	.52
July	.53
August	.53
September	.36
Total	2.75

Provided, however, that water solely from the natural flow of the Yakima River shall be delivered by the United States during

October, if desired by the District and found available by the officer in charge of the administration of the water supply for the Yakima project.

The annual irrigation season shall be from April to September, inclusive, and the maximum rate of flow at the said points of delivery which the District may demand during any one month, based on the above schedule, shall be 34 c.f.s.

There shall be delivered by the United States or its successor in the operation of the Sunnyside Canal in accordance with the contract of June 1, 1925, with the Grandview Irrigation District and the Prosser Irrigation District, to the Prosser Irrigation District for use upon the 15.21 acres of land, to which reference is made in said contract, 2.75 acre-feet of water per

acre; and the amount of water to be delivered to the Grandview Irrigation District pursuant to its contract with the United States, dated August 4, 1916, shall be reduced by the proportional amount applicable to the said 15.21 acres and the amount of water to be delivered by the United States pursuant to its contract with the Prosser Irrigation District dated December 1, 1917, shall be correspondingly increased.

The United States or its successor in the operation of the Sunnyside Canal shall also deliver each year, in addition to the water supply provided for in the foregoing contract of August 4, 1916, pursuant to its contract of February 21, 1933, with the District, 1970 acre-feet of water at Mile 50.35 of the Sunnyside Canal. The annual irrigation season for the delivery of water

shall be from April 1 to October 31, inclusive, and the mean monthly supply of water to be furnished under said contract shall not exceed the following schedule of percentages of the total annual diversion:

Month	Per Cent	Acre-feet Total of Contract
April	9	184
May	26	501
June	8	151
July	9	186
August	9	186
September	18	362
October	21	400
Total	100	1,970

The foregoing quantities of water for the Grandview Irrigation District shall be increased 3,000 acre-feet upon the execution of a contract for the acquisition of that quantity of water by the District and the United States as provided in paragraph 6 of this judgment. The increased quantity of

water shall not, however, be diverted into the Sunnyside Canal when to do so would augment the schedule of diversions in excess of the safe carrying capacity of the Canal.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contract.

(e) ZILLAH IRRIGATION DISTRICT.--The United States shall divert into the Sunnyside Canal 362 acre-feet of water annually, which quantity of water includes estimated losses from the point of diversion to the point of delivery, to supply the amounts of water provided for in a contract dated September 29, 1922, as amended by the contract of June 22, 1931, between the United States and the Zillah Irrigation District. The United States or its successor in the operation of

the Sunnyside Canal shall deliver water pursuant to the said contracts at turnouts numbered 15.47 and 15.62 and 16.82 on the Sunnyside Canal and the mean monthly supply of water shall not exceed the following schedule of percentages of the total diversion:

Month	Per Cent
April	9
May	15
June	19
July	19
August	19
September	13
October	6
Total	100

The annual irrigation season for the delivery of water shall be from April 1 to October 31, inclusive, each year.

The foregoing quantities of water for the Zillah Irrigation District shall be increased 200 acre-feet upon the execution of

a contract for the acquisition of that quantity of water by the District and the United States as provided in paragraph 6 of this judgment. The increased quantity of water shall not, however, be diverted into the Sunnyside Canal when to do so would augment the schedule of diversions in excess of the safe carrying capacity of the Canal.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

(f) GRANGER IRRIGATION DISTRICT.--The United States shall divert into the Sunnyside Canal 5,454 acre-feet of water annually which quantity of water includes estimated losses from the point of diversion to the point of delivery, to supply the amounts of water provided for in a contract dated November 20,

1922, between the United States and the Granger Irrigation District. The United States or its successor in the operation of the Sunnyside Canal shall deliver water pursuant to said contract during the irrigation season from April 1 to September 30, inclusive, at the head of the pressure pipe at Mile 23 of the Sunnyside Canal, said water to be delivered to the District in amounts not to exceed the following schedule:

Month	Acre-feet per acre
April	0.40
May	0.48
June	0.56
July	0.58
August	0.58
September	0.40
Total	3.00

The maximum rate of flow which the District may demand during any one month shall be as follows:

Month	Rate of Flow
April	10.9 c.f.s.
May	12.6 "
June	15.2 "
July	15.2 "
August	15.2 "
September	10.9 "

Provided, however, that water solely from the natural flow of the Yakima River shall be delivered by the United States during October, if desired by the District and found available by the officer in charge of the administration of the water supply for the Yakima project.

The foregoing quantity of water for the Granger Irrigation District shall be increased 1,800 acre-feet upon the execution of a contract for the acquisition of that quantity of water by the District and the United States as provided in paragraph 6 of this judgment. The increased quantity of

water shall not, however, be diverted into the Sunnyside Canal when to do so would augment the schedule of diversions in excess of the safe carrying capacity of the Canal.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contract.

(g) OUTLOOK IRRIGATION DISTRICT.--The United States shall divert into the Sunnyside Canal 17,855 acre-feet of water annually, which quantity of water includes estimated losses from the point of diversion to the point of delivery, to supply the amount of water provided for in the contract between the United States and Outlook Irrigation District dated November 23, 1914, as amended by the contracts of August 1, 1916, and July 1, 1919, and the contract dated December 20,

1932. The United States or its successor in the operation of the Sunnyside Canal pursuant to the said contract of November 23, 1914, as amended, shall deliver 14,530 acre-feet at Mile 30.25 on the Sunnyside Canal. The annual irrigation season for the delivery of water shall be from April to September, inclusive, and the maximum rate of flow which the District may demand during any one month, based on the following schedule, shall not exceed 46 c.f.s. and the monthly supply of water shall not exceed the following schedule of deliveries:

Month	Acre-feet Total of Contract
April	1890
May	2380
June	2730
July	2820
August	2820
September	1890
Total	14,530

Provided, however, that water solely from the natural flow of the Yakima River shall be delivered by the United States during October, if desired by the District and found available by the officer in charge of the administration of the water supply for the Yakima project.

The United States or its successor in the operation of the Sunnyside Canal, pursuant to the contract dated December 20, 1932, with the District, in addition to the water supply provided for in said contract of November 23, 1914, as amended, shall deliver

annually 1185 acre-feet at the headworks of the District in the Sunnyside Canal. The annual irrigation season for the delivery of water shall be from April 1 to October 31, inclusive, and the mean monthly supply of water to be delivered under the terms of said contract shall not exceed the following schedule of percentages of the total annual diversion:

Month	Per Cent	Acre-feet Total of Contract
April	6	70
May	11	130
June	16	185
July	15	180
August	15	180
September	12	145
October	25	295
Totals	100	1,185

The foregoing quantities of water for the Outlook Irrigation District shall be increased 4,500 acre-feet upon the execution

of a contract for the acquisition of that quantity of water by the District and the United States as provided in paragraph 6 of this judgment. The increased quantity of water shall not, however, be diverted into the Sunnyside Canal when to do so would augment the schedule of diversions in excess of the safe carrying capacity of the Canal.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

(h) SUNNYSIDE IRRIGATION DISTRICT.--The United States shall divert into the Sunnyside Canal 21,044 acre-feet of water, which quantity of water includes estimated losses between the point of diversion and the point of delivery, to supply the amounts of water provided for in a contract dated October 6,

1914, between the United States and the Sunnyside Irrigation District. The United States or its successor in the operation of the Sunnyside Canal shall deliver water pursuant to said contract to the headworks of the District, which are located on the West line of Section thirteen (13), Township nine (9) North, Range twenty-five (25) East, W.M., eleven hundred fifty-four and five-tenths (1154.5) feet North of the Southwest corner of said section, and the point at which said Canal enters said District. The annual irrigation season for the delivery of water shall be from April to September, inclusive, and the monthly supply of water shall not exceed the following schedule of deliveries:

Month	Acre-feet Total of Contract
April	2410
May	2960
June	3700

July	3690
August	3350
September	2410
Total	18,520

The maximum rate of flow which the District may demand during any one month, based on the above schedule, shall not exceed 60 c.f.s. Provided, however, that water solely from the natural flow of the Yakima River shall be delivered by the United States during October, if desired by the District and found available by the officer in charge of the administration of the water supply for the Yakima project.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contract.

(i) Nothing in this decree shall preclude the Prosser Irrigation District,

Snipes Mountain Irrigation District, Grandview Irrigation District, Zillah Irrigation District, Granger Irrigation District, Outlook Irrigation District or Sunnyside Irrigation District from the permissive use of surplus water in the Sunnyside Canal if available in the month of October, to the same extent and under the same conditions as prior to the entry of this judgment.

4. WAPATO INDIAN IRRIGATION PROJECT.--The United States shall deliver, pursuant to the Act of August 1, 1914, 38 Stat. 582, in perpetuity for lands within the Yakima Indian Reservation, hereinafter referred to as the Wapato Indian Irrigation Project, at the northern boundary thereof, a total of 720 cubic feet of water per second.

The United States shall, pursuant to the agreement dated September 21, 1943, between the Bureau of Reclamation and the Office of Indian Affairs, which superseded the agreement of March 9, 1921, as amended by an agreement dated September 3, 1936, divert from the Yakima River 250,000 acre-feet of water each year for the lands of the Wapato Indian Irrigation Project, such water to be measured at the diversion works of the Wapato Indian Irrigation Project. The irrigation season for the delivery of the 250,000 acre-feet of water shall be from April 1 to September 30, each year, except as the season may be by the United States extended to include the month of October. The diversion of the said 250,000 acre-feet of water shall be in

accordance with the following basic schedule:

Month	Percent of Season Total
April	9
May	21
June	20
July	23
August	21
September	6
Total	100

The foregoing basic schedule, as provided in the agreement of September 21, 1943, may be revised for a particular irrigation season or part of a season by agreement to be entered into prior to or during the irrigation season affected, between the Project Superintendent of the Bureau of Reclamation and the Project Engineer of the Office of Indian Affairs, to permit an interchange of quantities of water available at such time as storage is being released

for use below Union gap during the months of June, July, August and September and to permit the use of part of such available quantities during the month of October. The revision in such schedule shall be effective only as to the months of June, July, August and September in the same irrigation season as the making of the agreement and only from the date of storage release.

The United States shall divert each year in addition to the water supply hereinabove set forth for the Wapato Indian Irrigation Project, in accordance with the agreement dated September 3, 1936, between the Office of Indian Affairs and the Bureau of Reclamation, and the Act of July 1, 1940, 54 Stat. 707, 100,000 acre-feet of water from the Yakima River, to be measured at the diversion works of the Wapato Indian

Irrigation Project. The annual irrigation season for the delivery of such water shall be from April 1 to September 30 each year and the diversion of said 100,000 acre-feet shall be in accordance with the following basic schedule:

Month	Percent of Season Total
April	9
May	21
June	20
July	23
August	21
September	6
Total	100

The foregoing schedule, as provided in the agreement of September 3, 1936, may be revised by agreement between the Project Superintendent of the Bureau of Reclamation and the Project Engineer of the Office of Indian Affairs to permit, subsequent to the date of storage release, for use below Union

Gap in the months of June, July, August and September, the use of water interchangeably during said months in an amount not to exceed 70,000 acre feet.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said agreements.

5. TIETON DIVISION (Tieton Water Users' Association and Yakima-Tieton Irrigation District).--The United States shall divert annually into the Tieton Main Canal, to supply the water rights of parties entitled to receive water from the said Canal, for use on the lands within the boundaries of the Yakima-Tieton Irrigation District, 96,000 acre-feet on the following monthly schedule:

Month	Average Rate of Delivery in Cubic Feet per Second	Delivery in Acre-feet
May	293	18,000
June	336	20,000
July	325	20,000
August	325	20,000
September	302	18,000
		96,000

The foregoing schedule of diversions shall be increased commensurate with the quantity of water to be acquired from the United States by the Yakima-Tieton Irrigation District as provided in paragraph 6 of this judgment: Provided, however, that the water acquired by that District shall not be diverted into the Tieton Main Canal when to do so would augment the schedule of diversions in excess of the safe carrying capacity of the Canal.

6. KITTITAS DIVISION (Kittitas Reclamation District).--The United States

shall deliver to the Kittitas Reclamation District, pursuant to a contract dated February 16, 1921, as amended by the contracts of November 1, 1930, and June 4, 1940, and January 10, 1945, between the United States and the Kittitas Reclamation District, at a point opposite the headworks of the District constructed on the Yakima River in Section eleven (11), Township twenty (20) North, Range thirteen (13) East, W.M., during each irrigation season, 342,000 acre-feet of water measured at or near said diversion works for use upon lands within the boundaries of the District. The annual irrigation season for the delivery of water shall be from April 20 to October 15, inclusive, and the mean monthly supply of water shall not exceed the following

schedule of percentages of the total annual diversion as hereinafter set forth:

During	April	2%
"	May	17%
"	June	21%
"	July	21%
"	August	20%
"	September	13%
"	October	6%

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

The Kittitas Reclamation District has released, pursuant to the foregoing contract, as amended, to the United States 20,000 acre-feet of water in the months of April, May and June, and 10,000 acre-feet of water during the months of July, August, September and October from its water supply provided for in said contract, as amended, such water to be sold by the United States to the

following irrigation districts in the amounts set opposite the respective districts:

Yakima-Tieton Irrigation District	18,000	acre-feet
Granger Irrigation District	1,800	" "
Outlook Irrigation District	4,500	" "
Grandview Irrigation District	3,000	" "
Prosser Irrigation District	2,500	" "
Zillah Irrigation District	200	" "

7. ROZA DIVISION (Roza Irrigation District).--The United States shall deliver to the District, pursuant to a contract dated July 8, 1921, between the United States and the Yakima-Benton Irrigation District (now Roza Irrigation District), as amended by the contract of April 15, 1935, at a point opposite the headworks of the District located in Section twenty-eight (28), Township fifteen (15) North, Range nineteen (19) East, W.M., 375,000 acre-feet of water measured at or near said diversion works for

use upon lands within the boundaries of the District. The annual irrigation season for the delivery of water shall be from April 1 to October 31, inclusive; and the mean monthly supply of water shall not exceed the following schedule of percentages of the total annual diversion as hereinafter set forth.

During	April	10%
"	May	15%
"	June	19%
"	July	19%
"	August	19%
"	September	12%
"	October	6%

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

8. SELAH & MOXEE IRRIGATION DISTRICT.--The predecessor in interest of the Selah & Moxee Irrigation District, in

accordance with the instrument known as a limiting agreement, executed January 25, 1906, recorded March 12, 1906, in Volume 41 of Deeds at page 418 of the records of Yakima County, Washington, limited its right in the natural flow of the Yakima River as follows:

April to August, inclusive	September	October
78 c.f.s.	60 c.f.s.	40 c.f.s.

Such rights have been recognized by the United States in a contract dated November 15, 1920, between the District and the United States.

The United States shall deliver to the District, in accordance with the foregoing contract, 3,000 acre-feet of water at a point opposite the headworks of the District on the Yakima River which headworks are located in Section seventeen (17), Township fourteen

(14) North, Range nineteen (19) East. Willamette Meridian, the water to be delivered as nearly as practicable in compliance with the orders of the District.

The United States shall deliver annually to the District, pursuant to its contract dated April 30, 1931, with the District, in addition to the water supply provided for in said contract of November 15, 1920, 1757 acre-feet of water at the head of the Selah-Moxee ditch. The annual irrigation season for the delivery of water under said contract dated April 30, 1931, shall be from April 1 to September 30, inclusive, each year and the mean monthly supply of water to be delivered under said contract of April 30, 1931, shall not exceed the following schedule of percentages of the total annual diversion:

Month	Per Cent	Acre-feet Total of Contract
April	10	175.70
May	16	281.12
June	19	333.83
July	21	368.97
August	20	351.40
September	14	245.98
Totals	100	1,757.00

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts. The foregoing obligation of the United States to deliver water also is subject to an agreement dated October 27, 1939, between the Selah & Moxee Irrigation District and Terrace Heights Irrigation District, under the terms of which the Selah & Moxee Irrigation District transferred for the use of lands in the Terrace Heights Irrigation District one-tenth of the foregoing amounts. By reason thereof, the

obligation of the United States to deliver the foregoing amounts is reduced by one-tenth.

9. WEST SIDE IRRIGATING COMPANY.--The West Side Irrigating Company, in accordance with the instrument which it executed October 21, 1905, known as a limiting agreement, which instrument was recorded on the 14th day of March, 1906 in Book 2 of Water Rights at page 315 of the records of Kittitas County, Washington, limited its water rights in the natural flow of the Yakima River to 80 c.f.s. during the months of April to September, inclusive, and 34 c.f.s. during the month of October of each year. These rights were recognized by the United States in its contract of August 1, 1922, with said Company.

The United States, in accordance with the said contract of August 1, 1922, in addition, shall deliver to the Company 25 c.f.s. from April 20 to September 30, inclusive, provided that the total quantity of such water be limited to 8,200 acre-feet. The water shall be measured at a point in the canal known as the millpond wasteway and flume, located in the Southeast Quarter of the Southeast Quarter (SE¼SE¼) of Section Three (3), Township Eighteen (18) North, Range Seventeen (17) East of the Willamette Meridian.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contract.

10. UNION GAP IRRIGATION DISTRICT.--The Union Gap Irrigation Company and the Fowler

Ditch Company, predecessor in interest of the Union Gap Irrigation District, to which reference is hereafter made, in accordance with the instrument which they executed on November 25, 1905, known as a limiting agreement, limited their water rights in the natural flow of the Yakima River as follows:

April to August, inclusive,	23	c.f.s.
September	16	"
October	12	"

These rights were recognized by the United States in its contract of May 23, 1906, with the Union Gap Irrigation Company.

The United States shall deliver, pursuant to the said contract of May 23, 1906, during the months from April to August, both inclusive, 28 c.f.s., during the month of September, 19 c.f.s., and during the month of October, 14 c.f.s. During the months from

November to March both inclusive the United States in accordance with the contract shall deliver a reasonable amount of water for stock purposes. All water covered by the contract of May 23, 1906, shall be diverted and measured at the intake of the Fowler Ditch.

In addition, the United States shall deliver to the Union Gap Irrigation District, successor in interest of the Fowler Ditch Company, pursuant to its contract with the District dated March 2, 1915, 4222 acre-feet of water at the headworks of the District located approximately 950 feet west and 650 feet north of the southeast corner of Section seven (7), Township thirteen (13) North Range nineteen (19) East, W.M. The annual irrigation season for the delivery of water under the contract shall be from April 1 to

October 31, inclusive, and the monthly supply of water furnished under said contract of March 2, 1915, shall not exceed the following schedule of deliveries:

During	April	534	acre-feet
"	May	675	" "
"	June	712	" "
"	July	737	" "
"	August	797	" "
"	September	534	" "
"	October	233	" "
		4222	

The maximum flow for any one month to be 13 c.f.s.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

11. BROADWAY IRRIGATION COMPANY.--The United States shall deliver to the Broadway Irrigation Company 700 acre-feet from the natural flow water available in Wide Hollow

Creek pursuant to its contract with the Company dated December 1, 1921, and shall deliver said water at a point opposite the Company's headworks located 600 feet west of the east quarter corner of Section thirty-five (35), Township thirteen (13) North, Range eighteen (18) East of the W.M. The annual irrigation season shall be from April 1 to October 31, inclusive, and the monthly supply of water shall not exceed the following schedule of percentage of the total annual diversion as hereinafter set forth:

During	April	10%	-	70	acre-feet
"	May	15	-	105	" "
"	June	19	-	133	" "
"	July	19	-	133	" "
"	August	19	-	133	" "
"	September	12	-	84	" "
"	October	6	-	42	" "
	Total			700	

The quantity of water to be delivered shall be limited to that which is available in Wide Hollow Creek.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contract.

12. CASCADE IRRIGATION DISTRICT.--The Cascade Canal Company, in accordance with an instrument known as a limiting agreement which it executed December 12, 1906, limited its rights in the natural flow of the Yakima River to 150 c.f.s. from the period from March 15, to July 20; from July 20 to October 15 such rights are limited in accordance with the storage contract referred to in the succeeding paragraph, and from October 15 to March 15 to 30 c.f.s. for stock purposes. Such rights have been recognized by the

United States in a contract dated December 12, 1906, between the District and the United States. All of the rights of the Cascade Canal Company were transferred to and are now owned by the Cascade Irrigation District.

The United States shall deliver to the Irrigation District pursuant to the contract of December 12, 1906, a total of 16,800 acre-feet of water between July 20 and October 15 of each year, delivery of water to be at points higher on the river than the headgate of said District located in the Northwest Quarter (NW¼) of Section twenty-eight (28), Township nineteen (19) North, Range seventeen (17) East, W.M., and the water to be measured at a point on said canal below and within 100 feet of a certain wasteway from said canal in Section thirty-four (34), Township nineteen (19)

North, Range seventeen (17) East, W.M. At no time under said contract shall the District require a flow in excess of 150 c.f.s. of time.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contract.

13. TERRACE HEIGHTS IRRIGATION DISTRICT.--The United States shall, in accordance with its contract of February 10, 1940, with the Terrace Heights Irrigation District, which supplemented the contract of March 24, 1931, deliver annually a maximum of 3,259.5 acre-feet of water per annum, measured at or near the points of diversion in the main Roza canal, the maximum net deliveries at the points of delivery, after the deduction of

10% for evaporation and seepage losses, to be made in accordance with the following monthly schedule:

Month	Total Acre-feet	Second Feet
April	416.1	6.99
May	483.8	7.87
June	501.5	8.43
July	531.2	8.64
August	521.6	8.48
September	357.7	6.01
October	121.7	1.98
Total	2,933.6	

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations of said contract.

14. MOXEE DITCH COMPANY, SUB-A.--The Moxee Company, in accordance with an instrument known as a limiting agreement which it executed October 24, 1905, limited its rights to divert water from the Yakima River as follows:

April to August inclusive	September	October
38 c.f.s.	29 c.f.s.	22 c.f.s.

The rights so limited were later divided between the Moxee Ditch Company and the Hubbard Ditch company as follows:

Moxee Ditch Company

April to August, inclusive,	11	c.f.s.
September	8.4	"
October	6.4	"

Hubbard Ditch Company

April to August, inclusive,	27	c.f.s.
September	20.6	"
October	15.6	"

Such rights have been recognized by the United States in its contract with the Moxee Ditch Company, Sub-A, dated June 27, 1929.

The United States shall deliver annually to the Moxee Ditch Company, Sub-A, 959.4 acre-feet of water at the head of the Moxee or Hubbard Ditch in accordance with said

	April to August	September	October
Limiting agreement water	105 cfs	105 cfs	100 cfs
Additional water	11.77 "	8.51 "	6.91 "
Totals	116.77 "	113.51 "	106.91 "

In addition to the above mentioned water the Naches-Selah Irrigation District subsequent to the execution of said agreements purchased and acquired an additional water right of 2 c.f.s., which has been diverted through the canal of said District and used upon lands therein.

The United States shall deliver annually to the District in accordance with its contract of April 6, 1920, from April 1 to August 31, inclusive, a supply of "supplemental water" to be delivered in

amounts not to exceed the following schedule of deliveries:

During	April	674	acre-feet
"	May	811	" "
"	June	901	" "
"	July	1050	" "
"	August	1050	" "
	Total	4486	" "

The maximum rate of flow for such supplemental water shall not exceed 17.1 c.f.s. and shall be delivered at a point opposite the headworks of the District on the Naches River in the Southwest Quarter (SW¼), Northwest Quarter (NW¼), Section thirty-five (35), Township fifteen (15) North, Range sixteen (16) East, W.M.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contracts.

16. YAKIMA VALLEY CANAL COMPANY.--The Yakima Valley Canal Company, in accordance with the instrument which it executed January 8, 1906, known as a limiting agreement, which was recorded March 12, 1906, in Vol. 41 of Deeds at page 397, Yakima County, Washington, limited its water rights to 62½ c.f.s. during the months of April to August, inclusive, 40 c.f.s. during the month of September, and 30 c.f.s. during the month of October of each year. Subsequent to the limiting agreement the Company acquired certain additional water rights, purported to be 1½ c.f.s., by a conveyance recorded in Vol. 146 of Deeds, page 566 of the Yakima County records.

The United States by its contract with the Yakima Valley Canal Company, dated June 2, 1920, recognized in the Company the following rights or such part thereof as may

be available from the natural flow of the Yakima River:

	April to August (both inclusive)	September	October
Limiting agreement water	62.5 cfs	40 cfs	30 cfs
Transferred water	1.5 "	1.5 "	0.75 "
	64 cfs	41.5 cfs	30.75 cfs

The United States shall deliver to the Company each year, in accordance with the contract of June 2, 1920, 4300 acre-feet of storage water. Delivery of such water shall be made at a point opposite the headworks of the Company on the Naches River in the Northwest Quarter (NW¼) of Section twenty-five (25), Township fourteen (14) North, Range seventeen (17) East, W.M.

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations of said contracts.

17. The United States shall continue to divert available flood water from the Yakima River and its tributaries in accordance with its practice prior to the entry of this judgment, and the quantities of such water which the parties to this judgment are entitled to receive shall be over and above the schedules of diversion hereinabove set forth. Within the meaning of this judgment, flood water is available for such diversions when, as determined by the Yakima Project Superintendent, there is flowing over the Sunnyside dam flood water in excess of the amount he deems necessary for proper river regulation, including in said amount the amount necessary to protect fish life in the

river below said dam. The determinations by the Yakima Project Superintendent as to whether flood water is available for such diversions shall be binding upon the parties hereto, subject to review by the court. The United States, or its successor in the operation of the Sunnyside Canal, shall deliver at the points of delivery in said canal, as above set forth, the pro rata shares of the Sunnyside Valley, Prosser, Snipes Mountain, Grandview, Zillah, Granger, Outlook and Sunnyside Irrigation Districts of said flood waters.

18. The parties to this judgment, except as provided in paragraph 19 hereof, shall have equal rights with respect to the priority in the delivery of the quantities of water to which they are entitled under the preceding paragraphs of this judgment. If

contract of June 27, 1929. The annual irrigation season for the delivery of water shall be from April 1 to October 31, inclusive, each year and the mean monthly supply of water furnished under the contract shall not exceed the following schedule of percentages of the total annual diversion:

April	9%
May	15
June	19
July	19
August	19
September	13
October	6

The foregoing obligation of the United States to deliver water is subject to the conditions and limitations set forth in said contract.

15. NACHES-SELAH IRRIGATION DISTRICT.--The predecessor in interest of the Naches-Selah Irrigation District, in accordance with the instrument executed

December 21, 1905, known as a limiting agreement, limited its rights in the Yakima River during the months of April to September, inclusive, to 105 c.f.s., and 100 c.f.s. during the month of October, said limiting agreement having been recorded March 12, 1906, in Vol. 41 of Deeds, page 420, Records of Yakima County, Washington. Subsequent to execution of the limiting agreement, the predecessor in interest of the District acquired through conveyances certain additional water, and the United States by a contract dated April 6, 1920, with the Naches-Selah Irrigation District recognized in the District the following rights or such part thereof as may be available in the natural flow of the Yakima River:

for any cause it is impossible to supply fully those quantities, the water subject to proration to which each party to this judgment is entitled shall be proportionately diminished. The pro rata share of that water which each of the parties to this judgment shall receive during a period of insufficient supply shall be an amount in the same proportion to the quantity of water subject to proration that each of the parties is entitled to under this judgment as the total water supply available, as hereinafter defined, less the summation of the rights recognized in paragraph 19 bears to the aggregate of the following quantities of water: Those quantities of water provided for in this judgment which are subject to proration, and those quantities subject to proration which the United States has

contracted to deliver to water users not parties to this judgment; provided, however, that during the period of development of the Roza Division the amount of water to be included for that Division in the foregoing aggregate shall be the amount diverted for the irrigated lands of that Division in a normal year, plus estimated losses from the points of diversion to the place of delivery, rather than the amount recognized in paragraph 7 of this judgment; and provided further that, during the period of development of the Roza Division, in computing the pro rata share of water which the Roza Division will be entitled to receive in a period of insufficient supply there will be used that quantity of water diverted for the Roza Division in a normal year plus estimated losses, rather than the quantity

of the amount heretofore recognized in this judgment for the use on lands within the Sunnyside Valley Irrigation District, which amount shall constitute the limit of the water rights of said District not subject to proration, except as to those lands within the Sunnyside Valley Irrigation District which are covered by sub-paragraph 6 hereof. Provided, however, that not exceeding 50 c.f.s. of said amount may be measured daily by the Bureau of Reclamation from return flow of the Roza Division into the Sunnyside Canal. The amounts so excepted from proration shall be for the benefit of all lands within the Sunnyside Valley Irrigation District, subject to classification of lands by the Board of Directors of the District.

(4) 35 c.f.s. of water for the use on the so-called Konnewock lands, served from

the Sunnyside Canal, which amount shall constitute the limit of the water rights for said lands not subject to proration.

(5) 26 c.f.s. of water, for the use on Piety Flat lands, in accordance with the contract of May 1, 1914, between the United States and Piety Flat Ditch Company, served from the Sunnyside Canal, which amount shall constitute the limit of the water rights for said lands not subject to proration.

(6) 25 c.f.s. of water, in accordance with the contract of September 24, 1910, between the United States and Prosser Falls Land and Power Company, served from Sunnyside Canal, which is the limit of this right not subject to proration.

(7) 5 c.f.s. of water in accordance with the contract between the

recognized for that Division in paragraph 7 of this judgment.

For the purpose of this judgment "total water supply available" is defined as that amount of water available in any year from natural flow of the Yakima River, and its tributaries, from storage in the various Government reservoirs on the Yakima watershed and from other sources, to supply the contract obligations of the United States to deliver water and to supply claimed rights to the use of water on the Yakima River, and its tributaries, heretofore recognized by the United States.

19. The following amounts of water are excepted from the preceding paragraph with respect to proration, and the summation of said amounts shall be deducted from the

"total water supply available" subject to proration:

(1) 720 c.f.s. of water for the use on lands within the Wapato Indian Irrigation Project provided for by the Act of August 1, 1914 (38 Stat. 604), which amount shall constitute the limit of the water rights of the said Project not subject to proration.

(2) 250 c.f.s. of water during the months of May, June, July, August, and September of the amount heretofore recognized in this judgment for the use on lands within the Tieton Division, which amount shall constitute the limit of the water rights of said Division not subject to proration.

(3) 700 c.f.s. of water during the months of April, May, June, July, August, September, and the first 20 days of October,

United States and the Town of Prosser, dated May 3, 1911, served from the Sunnyside Canal, which is the limit of this right not subject to proration.

In addition to the amounts herein set forth which shall be excepted from paragraph 18 with respect to proration, there also shall be excepted from paragraph 18 the rights of Cascade Irrigation District which are recognized in paragraph 12, and the amounts claimed by other water users of natural flow rights from the Yakima River and its tributaries, which have heretofore been recognized by the United States whether or not such users are parties to this action, and the summation of said amounts shall also be deducted from the total water supply available subject to proration. Exception from proration of such amounts specified in

the preceding sentence from the total water supply available does not constitute a determination of the quantum or priority of such claimed rights, and is without prejduice to any of the parties to this action.

20. This judgment shall constitute a final determination of the obligation of the United States to deliver water from the Yakima River, and its tributaries, from storage from its various reservoirs in the Yakima watershed and from other sources to the parties to this judgment and the lands within the Wapato Indian Irrigation Project. Each of the parties to this cause, their grantees, successors and assigns are by this judgment forever enjoined and restrained from asserting any claim to or from interfering with any of the rights to the use or the delivery of those quantities of water which

are recognized in this judgment. This judgment shall not, however, be construed as limiting or in any way interfering with the transfer or legal succession of any of those rights. The rights of any claimants to water of the Yakima River or watershed who are not parties to this cause shall in no way be prejudiced or affected by this judgment nor will it in any way prejudice or affect the rights of the parties to this judgment as they may pertain to the rights of such claimants. This judgment shall be binding upon and inure to the benefit of the grantees, assigns or successors of the parties hereto. The several parties to this suit shall pay their own costs in this action.

The Court, in its discretion, may appoint a watermaster, who shall be vested

with such authority as the Court deems appropriate in the administration of the water rights, subject to the provisions of this judgment. This Court shall retain jurisdiction over matters of interpretation of this judgment and matters relating to the administration thereof.

Done in open court this 31 day of January, 1945.

/s/ L. B. Schwellenbach
Judge

Supreme Court, U.S.
FILED
NOV 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3) (3)

Nos. 85-255 and 85-451

In the Supreme Court of the United States

OCTOBER TERM, 1985

SUNNYSIDE VALLEY IRRIGATION DISTRICT, PETITIONER

v.

UNITED STATES OF AMERICA

UNION GAP IRRIGATION DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, while a state water adjudication was pending in its preliminary stages, the federal district court had jurisdiction to interpret its consent decree governing distribution of water from a federal reclamation project and to give instructions to the watermaster appointed pursuant to that decree.

2. Whether the district court abused its discretion in instructing the watermaster to regulate the flow of water in the Yakima River in late 1980 and early 1981 to protect salmon eggs in the River.

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In the Supreme Court of the United States

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4-18)[1] is reported at 763 F.2d 1032. The prior opinions of the court of appeals (Pet. App. 19-36, 37-56)

[1] Unless otherwise noted, "Pet. App." refers to the separately bound appendix to the petition in No. 85-255.

are unreported. The orders of the district court (Pet. App. 57-63, 64-72) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 14, 1985. The petition for a writ of certiorari in No. 85-255 was filed as of July 18, 1985, and the petition for a writ of certiorari in No. 85-451 was filed on September 11, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In 1855, the United States entered into a treaty with the Yakima Nation of Indians. Treaty of June 9, 1855, United States—Yakima Indians, 12 Stat. 951 *et seq.* (85-451 Pet. App. 76-87). See *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n* (*Fishing Vessel Ass'n*), 443 U.S. 658, 662 & n.2 (1979). By this Treaty, the Indians ceded their rights to millions of acres of territory, but reserved a tract of land, approximately one million acres in extent, to "be set apart * * * for the exclusive use and benefit of said * * * Indians, as an Indian reservation." Art. II, 12 Stat. 952. The Yakima River formed part of the boundary of the Reservation described in the Treaty. *Ibid.* Article III of the Treaty further reserved to the Indians "[t]he exclusive right of taking fish in all the streams, where running through or bordering said reservation * * * [, and] also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory * * *." 12 Stat. 953. "During the negotiations, the vital importance of the fish to the Indians was repeatedly emphasized by both sides, and the Governor's promises that the treaties would protect that source of food and commerce were

crucial in obtaining the Indians assent." *Fishing Vessel Ass'n*, 443 U.S. at 676.

Current estimates are that, prior to the arrival of white settlers in the area, 500,000 anadromous fish entered the Yakima River annually. By the turn of the century, the fish runs had been reduced to approximately 10% of their former size, or approximately 50,000 fish. In recent years, the total Yakima River anadromous fish run has been approximately 5,000 fish per year. C.R. 230.[2]

b. This case concerns the spring Chinook salmon, which are so named because they migrate from the ocean into fresh water rivers in the spring. They do not spawn, however, until September and early October. This is the period of historic low flows in the spawning rivers, including the Yakima River. The fish select an area of gravel riverbed where the water is approximately 12 inches deep. The female digs out a depression in the gravel and lays her eggs there. After the male fertilizes the eggs, the female covers the eggs with gravel. These nests of eggs, identifiable by the disturbed gravel, are called redds. For the successful development of salmon eggs, the redds must be in an environment of flowing water. Apart from keeping the eggs moist, the flowing water serves several purposes: it supplies oxygen to the eggs; it prevents freezing of the eggs when the air temperature dips below 32° F during winter months; and it eventually provides transport for the fry in leaving the gravel and moving into the river. It is the genius of the spring Chinook to spawn at a period of low water so that, in a naturally flowing river system, the site selected for spawning will be supplied with sufficient water in the succeeding

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[2] "C.R." refers to the Clerk's Record in the court of appeals.

months to permit proper development of the eggs. See Pet. App. 7-8; 11/25/80 Tr. 102-103, 105, 118-119, 122.

The Chinook salmon have been the subject of considerable litigation in the Pacific Northwest. In 1968, individual Yakima Indians and the United States filed two suits in the United States District Court for the District of Oregon against the State of Oregon and its officials, challenging that State's regulation of Indian treaty fishing on the Columbia River. The Yakima Indian Nation and the State of Washington were granted leave to intervene in those actions. In 1977, the parties signed a conservation agreement regarding all anadromous fish, including spring Chinook, spawning above Bonneville Dam. See *United States* v. *Oregon*, 657 F.2d 1009, 1011 (9th Cir. 1981). On April 30, 1980, the State of Washington applied for an injunction to restrain Yakima Indian fishing in the Yakima and Klickitat Rivers, both on and off the Reservation. The State asserted that the 1980 spring Chinook salmon runs up the Columbia River were extremely depressed and that all fish in the River were necessary for spawning escapement in order to preserve the resource. On May 5, 1980, the district court granted the injunction, finding that all the salmon from the 1980 run of spring Chinook into the Yakima River were necessary for spawning escapement. *Id.* at 1011-1012. The court of appeals affirmed. *United States* v. *Oregon*, *supra*.

2. a. At the time of the 1855 Treaty with the Yakimas, there was no irrigated agriculture in the Yakima River watershed. As early as 1859, however, some irrigation had commenced. By the turn of the century, individual irrigators and ditch companies had appropriated the entire low water flow of the

Yakima River and its tributaries in order to irrigate lands lying largely outside the Yakima Reservation. Pursuant to the Reclamation Act of 1902, ch. 1093, 32 Stat. 388, 43 U.S.C. 372 *et seq.*, and enabling legislation in Washington State, Wash. Rev. Code Ann. §§ 90.40.010 *et seq.* (1962), the Reclamation Service undertook to contract storage capacity in the Yakima watershed. In the period from 1909 to 1933, the Reclamation Service built six storage reservoirs. Pet. App. 6-7.

b. In 1930, toward the end of the construction period, a dispute arose over the scope of the obligation of the Bureau of Reclamation to deliver water to holders of repayment contracts under the Yakima Project. Individual irrigators brought suit against the Secretary of the Interior in the United States District Court for the District of Columbia to establish their right to receive water in an amount they previously had beneficially used on their lands, without incurring additional repayment obligations attributable to the construction of additional storage capacity. *Ickes* v. *Fox*, 85 F.2d 294 (D.C. Cir. 1936), aff'd, 300 U.S. 82 (1937), on remand, 137 F.2d 30 (D.C. Cir.), cert. denied, 320 U.S. 792 (1943).

In 1939, while *Ickes* v. *Fox* was pending, in the instant suit was filed by the United States and several irrigation districts in the Yakima Project against the individuals who were the plaintiffs in *Ickes* v. *Fox*, the Sunnyside Valley Irrigation District, and other irrigation districts. *Kittitas Reclamation Dist.* v. *Sunnyside Valley Irrigation Dist.*, Civ. No. 21 (E.D. Wash.). See E.R. 1-31.[3] The complaint recited the dispute, also involved in *Ickes* v. *Fox*, concerning whether those defendants and others had the right to

[3] "E.R." refers to the Excerpts of Record filed in the court of appeals.

share in Project water according to the amount specified in their contracts or in a greater amount according to past beneficial use (E.R. 8-28). The complaint sought a declaratory judgment concerning the obligation of the United States to furnish water from the Yakima Project to irrigation users under the Project and the allocation of irrigation water among Project users (E.R. 28-29). Several of the defendants subsequently filed "cross-claims," seeking joinder of all users of Yakima River water and a general adjudication of water rights in the Yakima River and its tributaries (E.R. 53-54, 66, 79-80, 83, 105-106). However, the additional parties necessary for that purpose were never joined.

In the 1943 decision in *Ickes* v. *Fox*, *supra*, the District of Columbia Circuit held that rights to Project waters were defined by beneficial use rather than the terms of the repayment contracts. That decision eliminated the basic legal issue among the parties in the present suit and "left only the matter of the respective rights of the water users within the project undetermined" (Pet. App. 78-79). In order to avoid the need for further adjudication on the latter question, the parties entered into a consent decree (Pet. App. 139-211). That decree defined the obligation of the United States to deliver water from the Project to the United States' co-plaintiffs, to the defendants, and "to the lands within the Wapato Indian Irrigation Project" on the Yakima Reservation (*id.* at 141-142). See, *e.g.*, *id.* at 144, 169-174.

c. In the years following 1945, the Bureau of Reclamation furnished irrigation water under the terms of the decree. In 1977, however, a record drought prompted several of the parties to seek further relief from the court under its retained jurisdic-

tion to administer and interpret the decree (Pet. App. 210-211). The district court appointed William G. Gray, the Yakima Project manager, as watermaster to supervise delivery of water under the decree (*id.* at 66).

The drought also prompted renewed efforts to adjudicate water rights in the Yakima watershed. For example, the Yakima Nation of Indians sought to intervene in this proceeding in 1977, but that request was denied. The Tribe also initiated a suit in federal court to establish its rights, but that action has been stayed. *Yakima Nation* v. *United States*, Civ. No. C-77-129 (E.D. Wash.). The State of Washington similarly filed an action in state court for a general adjudication of water rights in the Yakima watershed. *State Department of Ecology* v. *Acquavella*, No. 77-2-01484-5 (Yakima County, Wash., Super. Ct.). The United States, joined as a party thereto, removed that action to federal court. However, in January 1979, the *Acquavella* case was remanded by the federal court to the state court (*Washington* v. *Acquavella*, No. C-77-347 (E.D. Wash. 1979)), where it is still pending.

3. a. In the early fall of 1980, irrigation water released from the Yakima Project reservoirs created an artificially high stream flow in portions of the Yakima River. Between the confluences of the Cle Elum and Teanaway Rivers, the stream flow was approximately 1000 cubic feet per second (c.f.s.) or higher (10/29/80 Tr. 25). In early October, the Yakima Indian Nation's tribal biologist located 60 spring Chinook redds in this stretch of the river (C.R. 23). Because of the high flows, most of the redds were located at elevations in the streambed that would be uncovered when the irrigation delivery flows were terminated (10/29/80 Tr. 25-26). If the

streamflow had been sharply reduced by closing the gates to the Cle Elum Dam, the eggs would have been destroyed. Pet. App. 59-61.

In response to these events, representatives of the Yakima Indian Nation requested the watermaster to maintain the streamflow after the irrigation season had closed in order to save the redds from destruction (10/29/80 Tr. 11-12). Conferences among the Indians, the irrigators and the United States Fish and Wildlife Service failed to achieve a solution (*ibid.*). The watermaster then approached the district court for instructions. As his counsel expressed it, the watermaster requested guidance with respect to (10/29/80 Tr. 17-18):

> how he should go ahead to implement his authority and responsibilities under the 1945 decree, his responsibility to see that the waters are diverted and allocated in accordance with that decree. * * * [I]t appears implicit in his responsibility of operating the waters or the project in accordance with the 1945 decree he would also have to give consideration as to how the carryover waters and the waters in the reservoir should be established and maintained and handled to meet what he knows will be an upcoming irrigation season.

Following a hearing, the district court ordered the watermaster to maintain a streamflow of 650 c.f.s. in the River (or a lesser amount if the redds could be protected) until November 28, 1980 (Pet. App. 62).

A further hearing was held in November 1980. That hearing explored the effect of the previous order on water storage, the prospect of the need for future water releases, and methods for enhancing the survival of the redds with less waterflow. In its

supplemental instructions, dated November 28, 1980, the district court ordered the watermaster to maintain a sufficient flow of water to protect the redds (up to 650 c.f.s.) throughout the winter; other protective measures (transplantation of some eggs and construction of berms to deflect water over other redds); and a report to the court on methods of distributing water and operating the Project to avoid similar problems in the future (Pet. App. 69-72).

b. The court of appeals affirmed the district court's orders (Pet. App. 4-18).[4] The court first held that the district court, in issuing instructions to the watermaster, had properly exercised its retained jurisdiction to interpret and administer the consent decree (*id.* at 10-12) and that the district court was not required to dismiss that ancillary proceeding in favor of *Aquavella*, the pending state water adjudication

[4] The court of appeals' initial opinion in this case (Pet. App. 37-56) was issued on September 10, 1982. Petitioners filed for rehearing, contending that the decision below was inconsistent with the panel decision in *United States* v. *Washington (Phase II)*, 694 F.2d 1374 (9th Cir. 1982). The latter case concerned the rights of the Indians under the Treaty with the Yakimas and other treaties to a habitat for the fish that was free of degradation by the State. A petition for rehearing en banc thereafter was granted in *United States* v. *Washington, supra.* The en banc court entered a decision in that case on April 29, 1985, holding that the nature and extent of the treaty rights in this respect could not properly be addressed in a broad declaratory judgment, and must instead await a concrete controversy. See *United States* v. *Washington,* 759 F.2d 1353 (9th Cir. 1985), cert. denied, No. 85-164 (Nov. 18, 1985). The petitions for rehearing in this case had been held pending a decision on the en banc rehearing in *United States* v. *Washington, supra.* After the filing of a second set of rehearing petitions in this case, a final amended opinion (Pet. App. 4-18) was issued on June 14, 1985.

(*id.* at 13-15). The court of appeals next held that the 1945 consent decree in the instant case was not a general adjudication of all water rights in the Yakima River Basin and did not adjudicate the treaty rights of the Yakima Nation. For this reason, the court rejected petitioners' contention that the district court was barred by res judicata from taking special action to protect the fish. *Id.* at 12, 15-16.

Finally, on the merits, the court of appeals held that the district court did not abuse its discretion in issuing instructions to the watermaster in October and November 1980, in light of the emergency presented and the absence of information about alternative means of protecting the redds (*id.* at 16-17). In reaching this conclusion, the court of appeals specifically stated that it "need not decide the scope of fishing rights reserved to the Yakima Nation under the 1855 treaty" (*id.* at 18 n.5).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. The court below merely held that the district court did not abuse its discretion in giving instructions to the watermaster appointed to assist in the administration of a consent decree previously entered by that court. Those instructions enabled the court to address an emergency situation that threatened destruction of a substantial number of spring Chinook salmon eggs at a time when that species was so depleted that the Yakima Nation was enjoined from any harvesting. This narrow and fact-bound ruling in the administration of the consent decree does not warrant review by the Court.

1. Petitioners contend (85-255 Pet. 42-46; 85-451 Pet. 17-18) that the district court should not even have exercised jurisdiction over the controversy concerning the effect of the operation of the Yakima Project on the Chinook salmon redds in the fall of 1980. In their view, because a general adjudication of rights to the use of water in the Yakima River watershed was pending in state court, this Court's decisions in *Colorado River Water Conservation Dist.* v. *United States* (*Akin*), 424 U.S. 800 (1976), and *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545 (1983), required the district court to refer the matter to the state court. This assertion is without merit.

Akin and *San Carlos Apache* involved situations in which the federal adjudication was in a preliminary stage. In this case, by contrast, the federal district court had (i) entered a consent decree in 1945 that determined the respective rights of irrigation districts, as well as lands within the Wapato Indian Irrigation Project, to receive water from the Yakima Project; (ii) retained jurisdiction to interpret and administer that decree;[5] and (iii) appointed a watermaster to assist in administration. Confronted with an emergency, the watermaster requested instructions from the court under whose authority and decree he operated. Nothing in *Akin* or *San Carlos Apache* sug-

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[5] Contrary to the contention of petitioners in No. 85-255 (Pet. 38-41), because the consent decree expressly authorized the court to appoint a watermaster and to retain jurisdiction over matters relating to the "interpretation" and "administration" of the decree, the district court acted well within its authority when it issued instructions to the watermaster regarding the administration of the decree. That retained jurisdiction was not abrogated simply because the instructions specifically related to the Project's effect on the fish redds.

gests that a federal district court must decline to respond to such a request for instructions.

In addition, *Akin* and *San Carlos Apache* involved competing suits in federal and state court seeking a quantification of water rights. The dispute in this case concerned the operation of a federal reclamation project, not the quantification of water rights. Compare *Jicarilla Apache Tribe* v. *United States*, 601 F.2d 1116, 1135-1136 (10th Cir.), cert. denied, 444 U.S. 995 (1979) (dismissal of claim for general adjudication, but retention of jurisdiction over claim for injunction to restrain excessive diversions from water projects). The district court, in resolving this dispute, did not quantify a water right for the Yakima Indian Nation for fishery purposes. Instead, the court merely recognized that the preexisting Indian treaty fishing rights—which were confirmed by this Court in *Fishing Vessel Ass'n*—provided a relevant legal consideration in the operation of the Yakima Reclamation Project under the district court's prior consent decree.

The orders issued by the district court in 1980 also were dependent upon unique factual circumstances: first, the federal district court in Oregon had determined that all spring Chinook salmon entering the Yakima River were necessary for spawning escapement to preserve the run; and second, the jeopardy to the redds had been caused by the operation of the Yakima Project itself, because the artificially high river flows induced the salmon to spawn above the natural low flow elevation of the River. In light of these emergency conditions, the district court addressed the need for the Yakima Project to be operated to prevent destruction of the treaty-protected fish run, and it designed a remedy, through alteration

in the operation of the Project, to accomplish that end. In holding that the district court had not abused its discretion, the court of appeals expressly did not decide the scope of the Yakima Nation's treaty fishing rights (Pet. App. 18 n.5), much less the existence or extent of a reserved water right for that purpose. Its ruling therefore is entirely consistent with *Akin* and *San Carlos Apache* and implicates none of the concerns favoring deferral to state proceedings that were identified in those decisions.

2. Petitioners also contend (85-255 Pet. 32-37, 46-51; 85-451 Pet. 18-27) that the court of appeals erred in holding that the doctrine of res judicata, as applied to the 1945 consent decree, did not bar the district court from considering the effect of the operation of the Yakima Project on the spring Chinook salmon. In petitioners' view, this holding is contrary to the decision in *Nevada* v. *United States*, 463 U.S. 110 (1983). Petitioners concede (85-255 Pet. 48; 85-451 Pet. 24) that the litigation that led to the 1945 consent decree was not a general adjudication of all water rights in the Yakima River Basin; but they nevertheless seek to bind the United States and the Yakima Indian Nation as if it were such a general adjudication. As we explain below, petitioners' characterization of the litigation below is incorrect, and the court of appeals' decision is fully consistent with *Nevada* v. *United States*, *supra*.

In *Nevada* v. *United States*, *supra*, the United States and the Pyramid Lake Paiute Tribe instituted an action to establish rights to water from the Truckee River to benefit the fish in Pyramid Lake on the Pyramid Lake Indian Reservation. This Court held that under the doctrine of res judicata, the consent decree in a previous case, *United States* v. *Orr*

Water Ditch Co., Equity No. 3 (D. Nev.), barred the assertion of further reserved rights to Truckee River water on behalf of the Tribe. 463 U.S. at 145. The *Orr Ditch* litigation had been commenced in 1913 to quiet the title of all claimants to water from the Truckee River watershed, including the Indians of the Pyramid Lake Indian Reservation and the Newlands Reclamation Project. Consistent with this broad scope of *Orr Ditch*, the United States brought that action both on its own behalf and on behalf of the Reservation Indians. 463 U.S. 116, 118, 135, 138, 140. In finding the government's subsequent action barred by res judicata, the Court specifically stated that the purpose of the *Orr Ditch* litigation and decree was to settle the rights of all claimants to water from the Truckee River (463 U.S. at at 131-133) and that the government had been given a fair opportunity—and had taken that opportunity—to litigate the Reservation's entire right to such water (*ibid.*). In those circumstances, the Court held that the government's attempt to claim additional rights on behalf of the Tribe presented the same cause of action as the government had asserted in *Orr Ditch*. Relitigation therefore was barred under the doctrine of res judicata. 463 U.S. at 130-144.

The circumstances leading to the 1945 consent decree in the instant case were quite different from those involved in *Orr Ditch*. This case was initiated to determine the obligations of the United States in the distribution of water from the Yakima Reclamation Project to water users who held repayment contracts and the respective rights under the Project of the irrigation districts and the lands within the Wapato Indian Irrigation Project. It was not commenced to determine the rights of the Yakima Reclamation

Project as a whole as against all other claimants to the waters of the Yakima watershed.[6]

Consistent with this limited purpose, the original complaint named as parties only those entities and individuals who held contracts for water service from the Yakima Project (E.R. 14.), and the principal relief requested was a declaration whether the obligation of the United States to deliver Yakima Project water was defined by the amounts of water specified in individual contracts or by some other principle (such as past beneficial use). E.R. 28-29.[7] If a prin-

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[6] In contrast to the case of the Newlands Reclamation Project and the Truckee River, the government did not initiate a suit to quiet title to the waters of the Yakima River in connection with its commencement of the Yakima Reclamation Project. Instead, many then-existing water users executed limiting agreements, and the Secretary of the Interior limited the Yakima Indians' claim to the low-water flow of the Yakima River mainstem to 147 c.f.s. Congress subsequently repudiated the 147 c.f.s. limitation and ordered the Bureau of Reclamation to provide at least 720 c.f.s. to the lands of the Yakima Indian Reservation. Act of Aug. 1, 1914, ch. 222, § 22, 38 Stat. 604. A similar limiting agreement concerning the Indians' rights to waters in Ahtanum Creek, a boundary water of the Yakima Reservation, was construed by the Ninth Circuit in *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321 (1956), cert. denied, 352 U.S. 988 (1957), after remand, 330 F.2d 897 (1964). The Ninth Circuit there concluded that the agreement was a recognition of the non-Indians' subordinate water rights during the historic irrigation season and that the Indians' reserved rights to water from Ahtanum Creek were unimpaired at all other times. 330 F.2d at 915.

[7] The dispute underlying this litigation arose because the Reclamation Service had, in the years preceding 1930, delivered water to some lands served by the Project in excess of the amounts specified in the repayment contracts. In the early 1930's, the Secretary of the Interior attempted to require

ciple of limitation other than one based on the amounts specified in the contracts was to be chosen, the complaint requested a declaration concerning how water was to be allocated among the competing water users—in view of the practical reality that there might not be enough water available for the Project as a whole to satisfy that greater demand. It was only in this sense that the complaint requested a declaration of the rights among the parties (*id.* at 29).[8]

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those users to sign additional contracts for the excess water. Individual water users filed suit—first in the Eastern District of Washington (*Moore* v. *Anderson*, 68 F.2d 191 (9th Cir. 1933), cert. denied, 293 U.S. 567 (1934)), and then in the District of Columbia. *Ickes* v. *Fox*, *supra*.

[8] The petitioners in No. 85-255 rely (Pet. 49) on a selective quotation from Paragraph 18 of the United States' complaint for the proposition that the United States intended to put in issue all of the water rights in the Yakima Basin, including those of the Yakima Nation. Petitioners quote the portion of Paragraph 18 that states that "the * * * water rights of *said plaintiffs* and all of the defendants herein and of all of the parties having rights to receive water from the Yakima Project are * * * inter-related and inter-dependent" (E.R. 15 (emphasis added)). Petitioners fail to quote the opening sentence of Paragraph 18, which states: "All of defendants herein and plaintiffs *other than the United States* have contracts with the United States for specified amounts or proportionate shares of the water supply made available by the * * * Yakima Project, and *said plaintiffs* and all of defendants are dependent in whole or in part" on works constructed by the United States in connection with the Yakima Project (E.R. 14 (emphasis added)). The "said plaintiffs" in the sentence quoted by petitioners therefore obviously refers to the plaintiffs *other than* the United States who have contracts *with* the United States for the delivery of water from the Yakima Project. For this reason, Paragraph 18 plainly does not embrace any rights of the United States outside of the context of the Yakima Project.

The consent decree entered in 1945 effectuated the purpose of the complaint filed by the United States. The decree sets out schedules of the amounts of water to be delivered from the Project to each irrigation district and the lands of the Wapato Indian Irrigation Project[9] on a monthly basis during the irrigation season (Paras. 3-16, *reprinted at* Pet. App. 142-200), provides for an allocation system in times of shortage (Paras. 18, 19, *reprinted at* Pet. App. 201-209), and states that the "rights of any claimants to water of the Yakima River who are not parties to this cause shall in no way be prejudiced or affected by this judgment" (Para. 20, *reprinted at* Pet. App. 210). In sum, the litigation, as designed and concluded, settled only the rights among the users of Yakima Project water and the obligations of the United States to deliver the water available to the Yakima Project. The decree therefore was res judicata only with respect to those competing demands of irrigation districts and others to waters of the Yakima Project (compare *Montezuma Canal Co.* v. *Smithville Canal Co.*, 218 U.S. 371 (1910), upon which petitioners rely (85-255 Pet. 48; 85-451 Pet. 25)), not with respect to the aggregate rights of the Project as against all other users of Yakima River water, including any requirements for fishery purposes.

In contrast to *Orr Ditch*, then, the United States did not intend in the *Kittitas* litigation to take advantage of an opportunity to litigate the rights of the Yakima Indian Nation to water from the Yakima

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[9] The Wapato Indian Irrigation Project is operated by the Bureau of Indian Affairs and serves allotted lands within the Yakima Reservation. References to "Indian rights" cited by petitioner Sunnyside (85-255 Pet. 36) refer to this BIA project and not to the Yakima Indian Nation.

River. When the cross-claims were filed asking for joinder of additional parties and a general adjudication, the United States filed a motion to dismiss. Had *Kittitas* been expanded into a general adjudication, the Indians' *Winters* rights—as well as all reserved rights claimed by any other agency of the United States—presumably would have been put in issue. But the additional parties necessary to such a general adjudication were never joined, and that broad adjudication was never accomplished.[10]

In any event, the issue in this case is whether the 1945 decree was intended to require the operation of the Yakima Project in a way that destroyed fish life. At the very least, the decree was not intended to have that drastic result. This much is clear from Paragraph 17 of the decree. That paragraph provides for distribution to the irrigator parties of flood water in

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[10] This context is confirmed by a letter discussed in the government's response to petitioners' petition for rehearing in the court of appeals. In recommending dismissal of the cross-claims, government counsel noted the radical and burdensome expansion of the suit threatened by the cross-complaint:

> "The cross-complaint threatens a general adjudication which we definitely do not want and definitely is not within the scope of the complaint. We think that we can now with justification ask for the dismissal of this case without prejudice on the grounds * * * that it is wholly unnecessary, will subject the water users to unwarranted expense and is not the purpose of our original action. We might also consider pointing out to the court that if this action should result in a general adjudication of the Yakima, the Indians' rights under the Winter's doctrine would also be involved."

Response of U.S. to Renewed Petitions for Rehearing with Sugestion of En Banc Consideration 8, quoting letter from District Counsel to Commissioner, Bureau of Reclamation at 4 (Nov. 28, 1941).

excess of the amount to which those parties are entitled under the decree. Flood water is deemed to be available for this purpose when the Yakima Project supervisor determines that "there is flowing over the Sunnyside dam flood water in excess of the amount he deems necessary for *proper river regulation, including in said amount the amount necessary to protect fish life in the river below said dam*" (Pet. App. 200-201 (emphasis added)). The emphasized phrase manifests an intent to "protect fish life," and indeed deems that purpose an aspect of "proper river regulation." That is the principle recognized and applied by the district court and court of appeals.

We note as well that petitioners do not contend that the regulation of the Project and the River in late 1980 and early 1981, pursuant to the two instructions to the watermaster, affected the amount of water stored upstream to such an extent that the amount of water actually received by irrigators in 1981 was reduced below that to which they were entitled under the 1945 decree. If the irrigators' requirements were met, they have no cause to complain about the manner in which the Project was operated. Thus, unlike in *Nevada* v. *United States*, *supra*, where the United States and the Tribe asserted an actual reserved right to a quantity of Truckee River water that necessarily would have been recognized at the expense of irrigation uses, the operation of the Yakima Project in a manner that prevents destruction of treaty-protected fish does not necessarily infringe upon or conflict with irrigation uses.

Finally, as we have explained, the nature and extent of the Yakima Nation's fishing rights under the 1855 Treaty, as against other activities that affect the River, were not determined in this case (see Pet.

App. 18 n.5). The Ninth Circuit's recent decision in *United States* v. *Washington, supra* (discussed at note 4, *supra*), in fact makes clear that the court of appeals will proceed cautiously and on a case-by-case basis in exploring that issue. Nor does the court of appeals' decision recognize a reserved water right, as such, for the benefit of treaty-protected fishing rights. Cf. Pet. App. 48, 55 n.5. The adjudication and quantification of any such water right, along with all rights to water in the Yakima River Basin, will occur in the *Acquavella* litigation, which is pending in state court. Only when that litigation is completed will the respective rights of all concerned be known. There accordingly is no occasion for review by this Court of the resolution by the courts below of the episode concerning the Chinook salmon redds that occurred five years ago.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 491507 20052